Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-2241

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Appellants,

vs.

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Appellees.

On Appeal from the United States District Court for the District of Connecticut.

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LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Jurisdictional Statement

The appellants appeal from an order of the three-judge United States District Court for the District of Connecticut (Honorable J. Joseph Smith, Honorable T. Emmet Clarie and Honorable Jon O. Newman) dated the 17th day of May, 1976, which on the defendants' motion in a two to one decision with Judge Newman dissenting: (a) dismissed the plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted; (b) denied the plaintiffs' motion seeking a declaratory judgment that the Connecticut State Court pro hac vice attorney admission rule (Section 15A of the Connecticut Practice Book) is unconstitutional and that because it violates the equal protection clause of the federal Constitution; and (c) denied the plaintiffs'

motion for injunctive relief against the Judges of the Superior Court of the State of Connecticu requiring one of them to permit plaintiffs' cour a member in good standing of the New York State bar, to appear as trial counsel in a medical mal practice suit in the Connecticut State Superior Court of Fairfield County. (A copy of the notic of appeal is appended as Exhibit A.)

Opinions Below

The three-judge Court for the District of Connecticut which decided this case in the Court below decided it by a two to one majority consisting of a majority opinion by Judge Clarie in which Judge Smith concurred and a dissenting opinion by Judge Newman.

The majority found that the Connecticut pro hac vice attorneys admission rule was not unconstitutional on its face and dismissed the plaintiffs' complaint. Judge Newman in his dissent found that the Connecticut pro hac vice rule is unconstitutional on its face violating the equal protection clause and that the

manner in which the rule was applied with respect to the plaintiffs in this case violated the qual protection clause of the United States Constitution. A copy of the majority opinion is annexed as Appendix A. A copy of the dissenting opinion is annexed as Appendix B.

Also annexed are copies of prior opinions in this case in the courts below. Annexed as Appendix C is the decision of the Supreme Court of the State of Connecticut interpreting Section 15A of the Connecticut Practice Book. Annexed as Appendix D is the decision of the Supreme Court of the State of Connecticut affirming the order of the court below denying the plaintiffs permission to have Alfred S. Julien, their attorney of choice, represent them as trial counsel in a medical malpractice action in the Superior Court of the State of Connecticut.

Annexed as Appendix E is a copy of the prior opinion of the three-judge Court consisting of the same three judges as issued the order currently being appealed from where in three separate opinions, the three judge Court directed the plaintiffs to appeal to the Supreme Court of the State of Connecticut in order to obtain an authoritative interpretation of the meaning of Section 15A of the Connecticut Practice Book regarding the standards set out for the pro hac vice admission of out-of-state attorneys on a single-case basis in the State of Connecticut. This decision is officially reported at 359 F.Supp. 173 (D.Conn. 1972).

The plaintiffs appealed from the three judge Court to this Court which affirmed the judgment of the district court on April 23, 1973, Mr. Justice Douglas dissenting, noting that the Court had probable jurisdiction and that he would set the case down for oral argument. This Court's prior decision is

reported at 411 U.S. 941, 93 S.Ct. 1927 (1973). This Court's decision is annexed as Appendix F.

Annexed as Appendix G is a prior opinion and order of the Honorable T. Emmet Clarie, United States District Judge for the District of Connecticut entered on April 29, 1971 rendered by him at a stage in this action prior to the promulgation of the pro hac vice rule considered by the three judge Court and at a time when there was no written pro hac vice rule. In that opinion Judge Clarie considered

(a) the constitutionality of the denial of the application of appellants, as plaintiffs, in the State Court actions, to have Mr. Julien admitted pro hac vice, for the purpose of trying the State Court actions, and

(b) the constitutionality of the practice and policy of Connecticut's courts governing pro hac vice admission.

Judge Clarie held that the denial of the application, as well as the practice or policy underlying it, infringed appellants' rights under the equal protection clause of the Fourteenth Amendment.

Judge Clarie directed the State of Connecticut to promulgate a written rule regulating pro hac vice admission, and retained jurisdiction of the case.

The pro hac vice rule was thereafter promulgated.

Jurisdiction

This action was commenced pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1343(3) and (4) and 2283 for:

(a) a judgment declaring unconstitutional the practice and policy followed in the courts of Connecticut with respect to pro hac vice admission of out-of-state attorneys (prior to the promulgation of the pro hac vice rule considered by the three-judge court below, and at a time when there was no written pro hac vice rule);

(b) enjoining the appellee judges and clerk from enforcing said practice and policy;

(c) directing the appellee judges and clerk to admit Alfred S. Julien, a member of the bar of the State of New York (as well as the bar of other courts),

pro hac vice, to try this malpractice action (an application for the pro hac vice admission of Mr. Julien had been denied because counsel for the defendants in the state court actions objected); and

(d) staying the trial of the state court actions until said admission takes place.

Subsequently after Judge Clarie directed the State of Connecticut to promulgate a written pro hac vice rule, and this had been done, and an application to have Mr. Julien admitted under the rule had been denied, the relief sought in the federal action was necessarily altered (a) to declare the rule in vital respects unconstitutional; (b) to enjoin the enforcement of the rule in said respects; (c) to

direct the appellee judges and clerk to admit Mr. Julien pro hac vice to try the state court action for the plaintiffs-appellants therein; and (d) to stay the trial of the action until Alfred S. Julien had been admitted to try the action.

Simultaneously with the commencement of the federal action, appellants moved, pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction, granting the foregoing relief pending the determination of the federal action.

On December 14, 1972 the three judge Court found that the State of Connecticut Supreme Court should be given an opportunity to consider laying down guidelines as to how Section 15A of the Connecticut Practice Book with respect to the admission of out-of-state attorneys should be considered, abstained from deciding the action

until after the State Supreme Court had an opportunity to issue a ruling and retained jurisdiction pending the final determination by the Supreme Court of the State of Connecticut. See 359 F.Supp. 173 (D.Conn. 1972).

The Connecticut Supreme Court found that the plaintiffs had failed to establish good cause why his attorney Alfred S. Julien should be admitted pro hac vice as trial counsel and denied the plaintiffs' application to have Julien admitted pro hac vice.

Following the Connecticut Supreme Court's decision, the plaintiffs again sought relief from the three judge district court which had retained jurisdiction. The

defendants cross-moved to dismiss the plaintiffs' action for failure to state a claim upon which relief could be granted. The three judge court below granted the defendants' cross-motion and on May 17, 1976 filed an order and judgment to that effect (Exhibit B).

The plaintiffs are appealing from that order.

This Court has jurisdiction to review the decision of the three judge district court on a direct appeal pursuant to 28 U.S.C. 1253 and 2101(b).

The following decisions of this Court sustain the jurisdiction of the Supreme Court to review the order of the three judge district court on a direct appeal. See Moody v. Flowers, 387 U.S. 97, 101-102, 87 S.Ct. 1544 (1967) and authorities cited therein.

See, also, Norfolk and Western Railway Company v. Beatty, 96 S.Ct. 439 (1975).

Questions Presented

1. Does the Connecticut pro hac vice rule for the admission of out-of-state attorneys infringe a litigant's right under the Fourteenth Amendment's equal protection clause by not permitting a litigant to appear by counsel of his choice and limiting the admission of attorneys pro hac vice to criteria which are not permissible under this Court's decision in Schware v. Board of Bar Examiners, 353 U.S. 232 (1937).

2. Does the Connecticut pro hac vice rule infringe the due process rights of a litigant who wishes to retain an out-of-state attorney as trial counsel to be associated with a Connecticut attorney on an isolated case-by-case basis.

3. Is Connecticut's pro hac vice rule setting forth a criteria under which

attorneys would be admitted void for vagueness as being in violation of the Fourteenth Amendment's due process clause.

4. May the Connecticut court promulgate a pro hac vice rule which is intended to deprive the appellee in this case of his right to have his action tried by counsel of his choice and to construe it in such a fashion so as to deprive the appellee of the equal protection of the law.

5. Does Connecticut's pro hac vice rule which permits the court to prevent a litigant from having his action tried by counsel of his choice violate the litigant's right to counsel under the Sixth Amendment.

6. Does Connecticut's pro hac vice rule infringe the Fourteenth Amendment's due process rights of out-of-state attorneys to appear as counsel in Connecticut on an isolated

case basis and not as a regular practice where there are no guidelines set under which out-of-state attorneys will be permitted to appear in the Connecticut state courts.

7. May the Connecticut courts deny a litigant a right to have his action tried by counsel of his choice by making a finding which is totally unsupported by the record and which finding was specifically made clear by the court of original jurisdiction.

8. Does the Connecticut pro hac vice rule adopt a standard of classification in violation of the Fourteenth Amendment by setting out a criteria for the admission of attorneys which are constitutionally improper.

Statute Involved

The statute involved is 15A of the Connecticut Practice Book.

STATEMENT OF FACTS

Events Leading to the Promulgation of the pro hac vice Rule Considered by the Three-Judge District Court Below

The events leading to the promulgation of the pro hac vice rule considered by the three judge district court below are as follows:

May 9, 1968. ALFRED S. JULIEN, a member of the bar of the State of New York (as well as of the bar of other jurisdictions)--but not of the Connecticut State bar-- was engaged by appellants to prosecute claims for malpractice and negligence alleged to have been committed upon one HAROLD NATHAN, by certain of the appellees, the named hospital and the attending physicians. (a-108).

Mr. Julien was and is a nationally recognized specialist in the trial of mal-

practice and negligence cases (a-108). Julien has lectured on malpractice at various Law Schools, is the author of many articles on these and related subjects which have appeared in legal and medical journals, and is a past president of the American Trial Lawyers Association.

Two actions were then commenced in the Superior Court of the State of Connecticut, Fairfield County, by Connecticut counsel, Feingold and Fernino, acting as counsel of record (a-108).

October 25, 1968. Connecticut counsel applied to the Superior Court for permission to permit Mr. Julien to take the pre-trial deposition of appellees in one of the pending actions. (a-108-109).

The appellees objected, but the Superior Court Judge Bogdanski granted the appli-

cation. (a-108-109).

At the time, Connecticut had no written pro hac vice rule. Admission pro hac vice of out-of-state attorneys was at the whim and caprice of the individual judge. (a-144-145).

May 6, 1969. In an action brought by appellees, as plaintiffs, against appellants, as defendants, for injunctive relief, Superior Court Judge Tierney, in effect overruling his colleague, Judge Bogdanski, permanently enjoined Mr. Julien from "taking, participating in, assisting in or aiding and assisting other counsel at the taking of the depositions, and further enjoining appellants from making use of the legal services of . . . Alfred S. Julien for the purposes of taking, participating in, assisting in or aiding and assisting other counsel in the taking of the depositions." (a-109-110).

Judge Tierney rested his decision upon the fact that counsel for appellees (defendants in the state court actions) objected to Mr. Julien's participating in the cases. (a-110).

During the hearing on the application for the injunction, Judge Tierney had inquired whether it had not been customary "in certain specialized cases of this sort to permit outside counsel to appear and try the case." (a-111).

Counsel for appellees stated that it had been customary to do so where counsel for the other side did not oppose, but that outside counsel had never been permitted to appear and try a case where the other side objected. (a-111).

November 3, 1970. Connecticut counsel applied to the Superior Court for permission

to allow Mr. Julien to try the actions. (a-112). This was denied by Judge La Macchia without a hearing. (a-112).

March 3, 1971. Appellants commenced this action in the United States District Court for the District of Connecticut, under the Civil Rights Statutes, pursuant to 42 U.S.C. 1983, and 28 U.S.C. 1343 (3) and (4) and 2283, for a permanent injunction: (a) restraining the judges of the Superior Court of Connecticut from maintaining and continuing the policy or practice which prevented appellants from engaging the services of Mr. Julien, as their trial counsel in the state court actions; (b) directing the appellee judges and clerk to permit Mr. Julien to try said actions, pro hac vice, on behalf of appellants, in association with Connecticut counsel, and (c) staying the state court

actions until said admission took place.

Simultaneously, appellants moved for preliminary injunctive relief, directing the appellee judges and clerk to admit Mr. Julien, pro hac vice, in association with said Connecticut counsel, pending the determination of the District Court action, and also staying the state court actions pending said determination. In response, appellees moved to dismiss the federal court action.

Appellants' motion and appellees' cross-motion were heard before United States District Judge, T. Emmet Clarie. The Connecticut Bar Association received permission to file, and did file, an extensive amicus curiae brief.

Appellants urged that the denial of the application for Julien's pro hac vice admission, as well as the policy or practice

responsible for it, constituted invidious discrimination in contravention of the Fourteenth Amendment's equal protection clause.

Secondly, appellants urged that the denial of the application for pro hac vice admission represented an infringement of appellants' rights under the First and Fourteenth Amendments, in that the denial deprived appellants of a privilege and immunity secured by said amendments: the right to petition the courts for redress of grievances (i.e., to litigate their claims) by counsel of their own choosing, including out-of-state counsel.

Third, appellants contended that the state court, in denying the application for pro hac vice admission, impaired appellant's Fourteenth Amendment's due process right of property - i.e., to prosecute the suit for

wrongful death - by depriving them of trial counsel of their own choosing, including out-of-state trial counsel.

Appellants also urged that the state court's action constituted an impairment of appellants' right under the Sixth Amendment to the assistance of counsel, including out-of-state counsel, appellants arguing that the right to counsel vouchsafed by the said amendment embraces civil, as well as criminal, cases.

In their brief, appellees urged, first, that what was at issue was merely a property right not cognizable under 28 U.S.C. 1343 (3), the jurisdictional section which parallels the Civil Rights statute, 28 U.S.C. 1983.

Secondly, appellees contended that appellees had no standing because they had

failed to exhaust their state remedies, in that they had not taken an appeal to the Supreme Court of Connecticut from the Superior Court's denial of pro hac vice admission.

Third, appellees argued that since the State actions were already in progress, the Federal "anti-injunction" statute (28 U.S.C. 2283) applied.

Fourth, appellees contended that appellants' suit was barred by the "Theard Doctrine" (Theard v. United States, 354 U.S. 278), stating that federal courts do not, except in extremely limited circumstances, review state bar proceedings.

April 29, 1971. Judge Clarie decided these motions (Appendix G).

Judge Clarie overruled each of appellees' jurisdictional arguments, stating that appellant's claims were more substantial

than merely claims of denial of procedural due process standing alone (a-114), and that the rule of exhaustion of state remedies does not control the right to assert a claim under the federal Civil Rights Act in a federal court. (a-115).

Judge Clarie also held that the federal "anti-injunction" Act did not apply, since appellants were not defendants in a state court action brought against them, but had instituted the state court action, and were, by the federal court action, trying to eliminate what they considered to be an unconstitutional roadblock created by the State. (a-125).

Judge Clarie held that there are exceptions to the Theard Doctrine arising from constitutional claims involving the due process and equal protection clauses. (a-126).

Judge Clarie held that the state court's denial of Mr. Julien's pro hac vice admission, as well as the policy and practice responsible therefor, ran afoul of the Fourteenth Amendment's equal protection clause. (a-146); and that Connecticut's "blanket prohibition" against out-of-state attorneys is not uniformly observed. The admission of attorneys pro hac vice was at the whim and caprice of the individual judges of the courts of the state (a-146), there being no uniform or settled policy.

Judge Clarie held that "This inconsistent 'non-system' of admitting attorneys to practice pro hac vice in the courts of Connecticut violates the plaintiffs' rights under the equal protection clause of the fourteenth amendment to the federal constitution", citing Schware v. Board of Bar Examiners, 353 U.S.

232, 238, to the effect that "a State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment" (at page 238). (a-146).

Judge Clarie noted that Connecticut's practice "encourages arbitrary objection to counsel because of his superior ability in a specialized field of law". (a-150).

Judge Clarie, however, declined to grant appellants the injunctive relief requested, to direct the judges of the Connecticut Superior Court to admit Mr. Julien pro hac vice for the purpose of trying the state court actions. (a-148-153). Instead, he held that the state should be afforded an opportunity to consider and establish an objective rule which would clearly set forth

the rights of out-of-state attorneys to practice pro hac vice in Connecticut's Courts.

The Promulgation of the Pro Hac Vice Rule

June 21, 1971. The judges of the Superior Court of the State of Connecticut, pursuant to authority empowering them to do so, conferred upon them by statute (Conn. Gen. Stat., Sections 51-80), in purported compliance with the directive issued by Judge Clarie, promulgated a pro hac vice rule, Section 15A of the Connecticut Practice Book, which reads as follows:

> "An attorney who is in good standing at the bar of another state, the District of Columbia, or the commonwealth of Puerto Rico, may, upon special and infrequent occasion and for

good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state; provided, however, that a member of the bar of this state must be present at all proceedings and must sign all pleadings, briefs and other papers filed with the court and assume full responsibility for them and for the conduct of the cause and of the attorney to whom such privilege is accorded. Where

feasible, the application shall be made to the judge before whom such cause is likely to be tried. Good cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include a showing that by reason of a long-standing attorney-client relationship predating the cause of action or subject matter of the litigation at bar, the attorney has acquired a specialized skill or knowledge with respect to the client's affairs important to the trial of the cause, or

that the litigant is unable to secure the services of Connecticut counsel."

Further Developments in the Federal Action

April 13, 1972. Following the promulgation of the rule, appellees moved to dismiss the federal action as moot, because of the promulgation of the rule.

The appellants - who had meanwhile made an application for admission of Mr. Julien pro hac vice - under the new rule opposed appellees' motion on the ground that the rule did not constitute compliance with Judge Clarie's directive, in that, among other defects, the rule was in clear violation of the equal protection and due process clauses.

April 19, 1972. Judge Clarie denied

appellees' motion to dismiss the action; directed appellants to proceed with all reasonable speed with the application in the Superior Court for the admission of Mr. Julien under the pro hac vice rule; directed that the stay of the State court action remain in effect; and further directed that the court would retain jurisdiction pending the outcome of the admission application.

May 5, 1972. Judge Tierney of the Superior Court of the State of Connecticut denied the application for the admission of Mr. Julien under the pro hac vice rule. Judge Tierney, one of the judges who had promulgated the pro hac vice rule, based his decision upon the fact that there had been no showing either (a) of a longstanding attorney-client relationship predating the cause of action or subject matter of the litigation at bar, or

(b) that appellants were unable to secure the services of Connecticut counsel.

June 9, 1972. Appellants moved in the federal action for a final order granting the relief requested in the complaint.

At the same time, appellants requested Judge Clarie to convene a three-judge court pursuant to the provisions of 28 U.S.C. 2284, to be read with 28 U.S.C. 2281.

Those statutes mandate a three-judge court where a party seeks an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute on the ground of its unconstitutionality. The term "statute", embraces not only an act of the state legislature, but also any action - such as a rule - which is legislative in character, and to which a state gives the force of law.

Connecticut gives this rule the force of law. See In re: Application v. Dodd, 132 Conn. 237, 241, cited, Mrotek v. Nair, 4 Conn. Cir. 313, 231A 2d 95, 100. Accordingly, the pro hac vice rule is a statute for the purposes of convening a three-judge court. See, Lathrop v. Donahue, 367 U.S. 820, 81 S.Ct. 1826 (1961), and American Federation of Labor v. Watkins, 327 U.S. 582, 66 S.Ct. 761 (1945).

A three-judge court was convened. Appellants contended that 15A of the Connecticut Practice Book was unconstitutional.

December 4, 1972. The three-judge District Court decided the case, filing three separate and distinct opinions, the result of which: (a) denied appellants' application for a declaration of the unconstitutionality of the rule; (b) denied their application for

a temporary or permanent injunction, restraining the enforcement of the rule, and directing the appellee judges and clerk to admit Mr. Julien pro hac vice as trial counsel; (c) directed appellants to proceed with all reasonable diligence to obtain appellate review in the Connecticut Supreme Court of the denial of admission under the pro hac vice rule; (d) continued to stay the state court actions, and (e) retained jurisdiction pending the final outcome of the appeal to the Connecticut Supreme Court.

Judge Clarie, in his opinion, expressed the view that Judge Tierney of the Connecticut Superior Court had misread the pro hac vice rule in denying the application for Mr. Julien's admission and that appellate review of Judge Tierney's holding should be obtained.

Judge Clarie felt that Judge Tierney had mis-construed the word "may" in the rule (in the passage "may include a showing...") as meaning "must", so that the effect of that construction was to condition pro hac vice admission under the rule, upon a showing of either a longstanding attorney-client relationship predating the cause of action, or the unavailability of Connecticut counsel for the case. Judge Clarie felt that the word "may" clearly indicated that these two showings were merely illustrative rather than mandatory.

Judge Clarie also expressed the view that counsel on both sides who had appeared before Judge Tierney, had fallen into the same error in construing the rule.

For these reasons, as well as in the interests of federal-state comity, Judge

Clarie concluded that Judge Tierney's reading of the rule, and his ensuing determination, should be reviewed by the Connecticut Supreme Court.

Judge Newman--concurring in the result only, in an opinion--was of the view that the rule was clearly unconstitutional, under the equal protection clause, and felt that the constitutional issues should be decided, and in favor of appellants.

Judge Newman noted, however, that the other two members of the panel were divided, with one favoring abstention and the other dismissal, so that Judge Newman's adherence to a preference for reaching the merits would leave the case without a disposition. "In these circumstances", he wrote, "and solely to assemble a majority disposition, I concur in the result reached by Judge Clarie to ab-

stain to afford the Connecticut Supreme Court an opportunity for further consideration of plaintiffs' claim to employ counsel of their choice. While I do not believe such abstention is warranted in view of our obligation to decide constitutional questions properly brought to us, I fully share Judge Clarie's view that it would be desirable for the state courts to resolve this matter." 359 F.Supp. at 180.

Judge Newman believed that the rule clearly violates the equal protection clause because it conditions admission upon criteria which have no rational connection with the standards laid down by the Supreme Court in Schware v. Board of Bar Examiners, 353 U.S. 232, 239, as being the only applicable measuring rods on the question of admission to the bar -- namely, fitness, and capacity to prac-

tice law, or some qualification having a rational connection with either of these.

Plainly, "good cause" as defined in the rule -- has no rational connection with the out-of-state attorney's fitness or capacity to practice law. That being so, the conditions imposed for admission, stated above, violate not only the equal protection clause, but the due process clause of the Fourteenth Amendment, as well. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, supra. Moreover, the "specialized skill or knowledge with respect to the client's affairs important to the trial or cause," which the rule requires -- at least in the alternative -- is, as Judge Newman observed, just as valuable to the client whether that skill or knowledge was acquired as a result of an attorney-client relationship "predating

the cause of action", or the relationship had its inception subsequent to the accrual of the cause of action.

Similarly, Judge Newman concluded, the litigant's ability or inability to secure the services of Connecticut counsel is also entirely unrelated to the personal, moral and professional qualifications (i.e., fitness, and capacity to practice law) of the out-of-state attorney they wish to employ. There is, as Judge Newman wrote, "no dispute here concerning the qualifications of the attorney plaintiffs wish to employ."

The case was remanded to the Supreme Court of the State of Connecticut for the definitive interpretation of the pro hac vice rule.

March 18, 1975 The Connecticut Supreme Court following the mandate of the three-judge Court's decision of December 14, 1972 interpreted the Connecticut pro hac vice rule in a 4 to 1 decision with Justice Bogdanski dissenting (Appendix C).

The Connecticut Supreme Court practically ignoring everything that had transpired made the following findings:

(a) That Judge Tierney of the Connecticut Superior Court had not misread the pro hac vice rule although Judge Tierney had found that the criteria set out in the pro hac vice rule that good cause meant only a long standing relationship or the inability of a litigant to obtain Connecticut counsel, while the Connecticut Supreme Court

in its opinion clearly stated that a long standing attorney-client relationship or inability to obtain Connecticut counsel were only illustrations of what was meant by good cause; and

(b) That the plaintiffs' entire claim had no merit to it since the case was "essentially one where the trial court found that the plaintiff had not sustained his burden of proof" (a-57).

Judge Bogdanski dissented refusing to state that Judge Tierney's obvious misinterpretation of the pro hac vice rule had been proper when Judge Tierney had clearly stated that he considered the guidelines for good cause as set out in the rule itself as being exclusive and not merely illustrative and indicated that he would remand the matter to the Connecticut Superior Court for a hearing as to whether or not

the plaintiffs had shown good cause pursuant to the criteria which the Supreme Court had now established (a-57-60).

The Current Three-Judge Court Decision Being Appealed From

Following the Supreme Court's decision it was obvious to the plaintiffs that the Connecticut pro hac vice rule had been formulated so as to prevent them from being permitted to make use of Alfred S. Julien as their trial counsel in the malpractice case pending in Connecticut. The decision of the Connecticut Supreme Court which made findings of fact totally unsupported by the record and which, in fact, were directly contradicted by the record, are not binding upon this Court and this Court may make its own findings of fact based upon the record. See, Fiske v.

Kansas, 274 U.S. 380, 385-386 (1927); and Norris v. Alabama, 294 U.S. 587, 590 (1931).

It being made plain to the plaintiffs that they could obtain no relief from the Connecticut State Court and that the three-judge district court in its decision of December 14, 1972 referring the matter to the Supreme Court had retained jurisdiction pending the decision of the Connecticut Supreme Court (359 F.Supp. at 177), the plaintiffs renewed their motion before the three-judge Court to have the Connecticut pro hac vice rule declared unconstitutional, to declare the rule as applied against the plaintiffs unconstitutional and for an injunction directing the judges of the Superior Court of the State of Connecticut to admit Alfred S. Julien to act as trial counsel.

The defendants cross-moved to dismiss the plaintiffs' complaint on the grounds that it failed to state a claim upon which relief could be granted.

On April 30, 1976 the Court issued its decision on the motions before it and in a two to one opinion, the majority consisting of Judges Smith and Clarie, granted the defendants' motion to dismiss the plaintiffs' action for failure to state a claim and denied the plaintiffs' motion to declare the Connecticut pro hac vice rule unconstitutional and to permit Alfred S. Julien to act as trial counsel for the plaintiffs in the Connecticut State Court.

Judge Newman dissented.

The Court's decision was later embodied in an order and judgment filed on May 17, 1976 (Exhibit B).

It is from that order that the plaintiffs are appealing to this Court (Exhibit A).

The majority opinion written by Justice Clarie followed the nunc pro tunc reasoning of the Connecticut Supreme Court and held that the reason Julien had not been permitted to act as trial counsel was not because the Connecticut pro hac vice rule was constitutionally defective or had been created to prent Julien from acting as plaintiffs' trial counsel, but simply that the plaintiffs had failed to show good cause as interpreted by the Connecticut Supreme Court and not in the narrow sense in which good cause had been interpreted by Justice Tierney when plaintiffs had applied to have Julien act as plaintiffs' trial counsel (a-27-28).

This finding of the majority opinion based upon grounds other than those in the record and directly contradicted by the record is impermissible as Judge Newman properly pointed out in his dissent. See SEC v. Chenery Corp., 318 U.S. 80, 87-88, 63 S.Ct. 454, 459 (1943).

The majority in its decision relied principally upon the decision in the case of Norfolk and Western Railway Company v. Beatty, 400 F.Supp. 234 (S.D.Ill. 1975), aff'd. 96 S.Ct. 439 (1975).

In the Norfolk and Western case a railroad sought to have its attorneys who are not members of the Illinois bar appear together with local counsel on a regular basis to defend FELA and Jones Act cases brought against the railroad in the Illinois State Courts.

The Illinois Court refused to permit out-of-state counsel to act as trial counsel on that regular basis but did permit them to provide advice in the course of the litigation and to participate in pretrial discovery.

The railroad commenced an action in the federal court challenging the constitutionality of the Illinois pro hac vice rule which prevented the railroad's attorneys who were not members of the Illinois Bar from appearing as counsel for the railroad on a regular basis so long as the railroad's counsel were associated with local Illinois counsel.

The Court in Norfolk and Western dismissed the railroad's complaint finding that the Illinois rule was not unconstitutional in that:

"It is not a complete bar to out-of-state lawyers, but permits their full participation in isolated cases on a case-by-case determination. Nor in the present Madison County cases is the participation of out-of-state attorneys completely barred. They may be present and participate with local counsel, though that participation is limited."

400 F.Supp. at 237.

The majority in Norfolk and Western in reaching its decision relied principally upon the dissent of Judge Smith in the prior three judge Court's decision in this case, Silverman v. Browning, 359 F.Supp. 173 (D.C.Conn. 1972).

Judge Smith was one of the two judges who affirmed a majority on the three judge court from whose decision the plaintiffs are now appealling to this Court. The plaintiffs cannot help but feel victimized by what has become a vicious cycle wherein the Court in Norfolk and Western relied upon Judge Smith's dissent in Silverman v. Browning for its decision and the three judge court's majority opinion from which the plaintiffs are now appealing relied upon Norfolk and Western as grounds for dismissing the plaintiffs' complaint.

The Illinois pro hac vice rule upheld as constituional in Norfolk and Western is totally different from the pro hac vice rule of Connecticut under attack here.

The Illinois pro hac vice rule set forth at 400 F.Supp. 236 simply provides that with the Court's permission an out-of-state attorney may participate in the trial of an action in Illinois. It does not set up any standards for such participation which are unconstitutional and violative of the standards set out in Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752 (1957).

In addition, the Illinois pro hac vice rule considered in Norfolk and Western did not prohibit or prevent out-of-state counsel from appearing in Illinois, but simply limited such appearances to isolated cases and on a case-by-case basis. The Illinois rule only acted to prevent the railroad from in essence having as regular counsel in Illinois attorneys who were not members of the Illinois Bar.

The issue now before the Court as Judge Newman recognized in his dissent is whether or not Connecticut which does permit out-of-state attorneys to appear on infrequent occasions has in our case refused to permit counsel for the appellants to appear on grounds which deny the appelants the equal protection of the law.

This Court recognized in In Re Griffiths, 413 U.S. 717, 93 S.Ct. 285 (1973), that a state which adopts a suspect classification bears a heavy burden of justification. In our case the statute before the Court -- the Connecticut pro hac vice rule -- makes an arbitrary distinction between litigants who are associated with counsel for a longer period of time and others. It also makes an arbitrary distinction between those persons who are able to obtain Connecticut counsel and those who cannot. This denies the equal protection of the law.

The Connecticut Court in our case refused to permit the appellants to appear by counsel of their own choice on grounds which had no rational relationship to the legitimate interest of the State in regulating the practice of law. As Judge Newman accurately pointed out in his dissent, the trial judge in Connecticut made it clear that he was denying the appellants' application for the pro hac vice admission on impermissible grounds. That is the finding which is constitutionally defective and which should be reversed by this Court. The fact that the Connecticut court several years later attempted to provide an interpretation nunc pro tunc as to why plaintiffs' counsel was denied pro hac vice admission cannot make a constitutionally impermissible finding valid.

Conclusion

The appellants were denied their right to appear by counsel of their choice under the Connecticut pro hac vice rule which standards or lack of standards are void for vagueness and deny the appellants the equal protection of the laws. This Court should hear the appeal on the merits and reverse the majority's finding in the three-judge district court below.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL SO AS TO REQUIRE BRIEFS ON THE MERITS AND ORAL ARGUMENT.

The appellants submit that there is little doubt that the questions presented by this appeal are substantial in nature for the following reasons:

(a) The Connecticut pro hac vice rule expressly conditions admission of attorneys upon criteria which have no rational connection with the out-of-state attorneys fitness or capacity to practice law or to represent a litigant. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752 (1957);

(b) Connecticut's pro hac vice rule is diametrically opposed to the proposition expressed in the the Code of Professional Responsibility, Ethical Considerations, 3-9, which provides:

"[T]he demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

(c) Connecticut's pro hac vice rule in essence bars litigants from making use of competent counsel of their choice who are not members of the Connecticut State Bar but who are associated with Connecticut counsel,from representing them in their actions in Connecticut and, in essence, is providing a system which serves as economic protection for Connecticut lawyers at the expense of persons who are required to bring or defend an action in Connecticut State courts and attorneys who are not members of the Connecticut Bar;

(d) The plaintiffs in this action have a constitutional right to be represented by counsel of their choice on a pro hac vice basis so long as plaintiffs' counsel does not appear in Connecticut on a regular basis without being admitted to the Connecticut bar.

(e) To permit Connecticut's pro hac vice rule to remain would be to encourage other states to pass similar rules whose effect and purpose would be to discourage and prevent counsel of superior ability in a specialized field of law to appear as counsel depriving both litigant and the attorney of their constitutional rights;

(f) The present Connecticut pro hac vice rule was promulgated with the obvious intent and in such language so as to thwart the directive of the United States District Court, its obvious purpose being to phrase the rule in such language so as to exclude the plaintiffs in this action from being represented by Alfred S. Julien, trial counsel of their choice in the action in Connecticut State Court.

The fundamental question on this appeal which should be decided by this Court and which deserves a definitive determination by the Court is whether or not any state may promulgate a pro hac vice rule so as, in effect, to prevent a litigant from retaining counsel in an isolated instance and not on a regular basis to represent him in an action when that out-of-state attorney chosen by the litigant is a member in good standing of the bar of a sister state and has associated himself with an attorney in the State of Connecticut who will be responsible for his actions and will be available to apprise him of the local rules.

Any pro hac vice rule which limits the right of a litigant to choose such counsel on a single case basis deprives that litigant of his constitutional rights to the equal protection of the law and his right to have counsel of his own choice representing him.

The importance of the questions presented on this appeal is also illustrated by the fact that the Connecticut Bar Association has filed amicus curiae briefs at the various stages of this proceeding on behalf of the Connecticut State Bar. This is obviously not an appeal which will affect only the rights of the appellants in this case, but will have far-reaching ramifications if the Connecticut pro hac vice rule is permitted to exist in its present state.

The questions presented by this appeal meet the substantiality test required to have this Court give this action plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

Alfred S. Julien
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New York, New York 10007
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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------X

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiff,

-against-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE JOHN J.P. RYAN, Clerk of the Superior Court of the State of Connecticut, Fairfield County, Stamford, Connecticut, JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Connecticut.

Defendants.

----------X

CIVIL ACTION B-259

NOTICE OF APPEAL

S I R S:

PLEASE TAKE NOTICE, that the plaintiff hereby appeals to the Supreme Court of

the United States, pursuant to 28 USC 1253 and 2101(b) and pursuant to Rule 10 of the Rules of the Supreme Court of the United States, from the order of the three Judge District Court, dated May 14, 1976, and filed in the office of the Clerk of the District Court on May 17th, 1976:

a) Granting the defendants' motion to dismiss the plaintiff's action for failure to state a claim upon which relief could be granted,

b) Dismissing plaintiff's complaint seeking a declaratory judgment declaring that the Connecticut State Court pro hoc vice Attorney Admission Rule (§15A of the Connecticut Practice Book) is unconsti-

tutional and void in violation of the Equal Protection Clause of the United States' Constitution, and

c) Denying the plaintiff's request for injunctive relief against the Connecticut Superior Court Judges requiring them to admit plaintiff's attorney, ALFRED S. JULIEN, who is a member in good standing of the New York State Bar to appear as Trial Counsel in two pending actions in the Connecticut State Superior Court of Fairfield County.

Dated: New York, N.Y.
June 14, 1976

Yours etc.,

ALFRED S. JULIEN

Attorney for Plaintiff
Office & P.O. Address
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New York, N.Y. 10007

TO: ATTORNEY GENERAL OF CONNECTICUT
30 Trinity Street
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Clerk of the United States
District Court
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EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------X

(G)EROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN AND ADELE NATHAN :

vs. :

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE JOHN J. P. RYAN, Clerk of the Superior Court of the State of Connecticut, Fairfield County, Stamford, Connecticut, JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Connecticut. : CIVIL ACTION B-259

----------X

JUDGMENT

This action having come on for hearing before a three-judge District Court, Honorable J. Joseph Smith, Senior United

States Circuit Judge; Honorable T. Emmet Clarie, Chief United States District Judge; and Honorable Jon O. Newman, United States District Judge, and the issues having been duly heard and a Memorandum of Decision dated April 30, 1976, having been duly rendered, it is

ORDERED and ADJUDGED that the plaintiff's prayer for declaratory judgment be and hereby is denied; and it is further

ORDERED and ADJUDGED that the defendants' motion to dismiss the action is granted and this action is hereby dismissed.

Dated at New Haven, Connecticut, this 14th day of May, 1976.

CLERK, UNITED STATES DISTRICT COURT

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------X

JEROME SILVERMAN, as Administrator of the ESTATE of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-vs-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE JOHN J.P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN.; JUDGE OTTO H. LA MACCHIA, and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Defendants.

Civil No. B-259

----------X

Before: SMITH, Circuit Judge, CLARIE and NEWMAN, District Judges.

MEMORANDUM OF DECISION

CLARIE, District Judge:

The plaintiff[1/] seeks a judgment de-

claring that the state court pro hac vice attorney admission rule, (§ 15A of the Connecticut Practice Book), is unconstitutional and void, because it is in violation of the equal protection clause of the Federal Constitution. He requests injunctive relief against the Connecticut Superior Court Judges requiring one of them to admit the plaintiff's attorney, who is a member in good standing of the New York State Bar, to appear and try two pending malpractice suits in the State Superior Court of Fairfield County, at Stamford.

The defendants have moved to dismiss the action for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter. Plaintiff brings this action under the civil rights act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3), and also alleges federal question jurisdiction pursuant to 28 U.S.C. § 1331, based upon alleged

violations of the fifth, sixth and fourteenth amendments.

Facts

To adequately understand the issues, it is necessary to have a perspective of the background of this litigation. Therefore, the Court will summarily review what has transpired in this case to date. In May 1968, Attorney Alfred S. Julien, a New York medical malpractice specialist, was retained to prosecute two wrongful death actions for alleged malpractice and negligence, against a Stamford, Connecticut, hospital and associated medical personnel, who had attended and furnished professional care to Harold Nathan, the plaintiff's decedent. The original suits were commenced in the Connecticut Superior Court by a local attorney and it was generally understood that Connecticut counsel would continue to assist out-of-state specialist counsel and be pres-

ent at the trial. In October 1968, then Superior Court Judge Bogdanski (now a Justice of the Connecticut Supreme Court), over defendants' objection, authorized Attorney Julien to take pre-trial depositions of the defendants. At that time, however, Judge Bogdanski alerted counsel to the fact that he doubted the state court would permit Attorney Julien to try the case, but that the question would not be decided until the time of trial.

In May 1969, the defendants in the state suit sought a state court injunction restraining the plaintiff's out-of-state attorney from assisting or aiding other counsel at the taking of the defendants' depositions, until he had complied with the rules of the Connecticut Practice Book and the Connecticut General Statutes relating to the admission of out-of-state attorneys. After a hearing before Judge Tierney, the court granted injunctive relief and entered an order prohibiting

Attorney Julien from participating or assisting in the pre-trial preparation of the case or the trial, until he had complied with the rules and statutes pertaining to the admission of out-of-state attorneys. On November 20, 1970, local counsel again moved that Attorney Julien be permitted to conduct the trial and Superior Court Judge La Macchia denied that motion.

In March 1971, the plaintiff initiated this federal action to restrain the state court judges and the Superior Court clerk in Fairfield County from continuing a policy and practice which would prevent the plaintiff from exercising his claimed constitutional rights to a free choice of counsel, by denying him the right to have his retained out-of-state counsel try his case as counsel in charge, with a Connecticut attorney present. At the initial hearing before a single judge, this Court found that no uniform rule existed for

the admission of pro hac vice out-of-state counsel. It ruled further that the existing custom and practice was subject to the whim and fancy of the judge who happened to be presiding at the time; and that such an arbitrary "non-system rule" was likely to violate a litigant's right to equal protection under the fourteenth amendment to the Federal Constitution.

This Court held that justice and comity required that the State of Connecticut should be afforded a reasonable opportunity to establish an objective rule or benchmark, to clearly set out the rules governing the admission of out-of-state attorneys to practice pro hac vice in Connecticut courts. Counsel agreed to a temporary stay order, delaying the trial of the state court malpractice actions, until the issue concerning choice of counsel could be resolved. See 359 F.Supp. 173, 174-5.

On June 21, 1971, the State Superior Court judges enacted a new pro hac vice rule, § 15A of the Connecticut Practice Book, which provides as follows:

> "An attorney who is in good standing at the bar of another state, the District of Columbia, or the commonwealth of Puerto Rico, may, upon special and infrequent occasion and for good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state; provided, however, that a member of the bar of this state must be present at all proceedings and must sign all pleadings, briefs and other papers filed with the court and assume full responsibility for them and for the conduct of the cause and of the attorney to whom such privilege is accorded. Where feasible, the application shall be made to the judge before whom such cause is likely to be tried. Good cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include a showing that by reason of a long standing attorney-client relationship predating the cause of action or subject matter of the litigation at bar, the attorney

> has acquired a specialized skill or knowledge with respect to the client's affairs important to the trial of the cause, or that the litigant is unable to secure the services of Connecticut counsel." (Emphasis added).

Upon the adoption of this new rule, the defendants moved to dismiss the federal action. The plaintiff claimed, however, that the new rule was also unconstitutional, because the showing of "good cause" as required by the rule had no rational connection with the out-of-state attorney's moral fitness or general capacity to practice law and that these were the only permissible criteria laid down in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). This Court denied the defendants' motion to dismiss and directed that the plaintiff proceed to have his state application for admission pro hac vice considered under the newly amended state admission rule.

The plaintiff's counsel renewed his motion for admission of out-of-state counsel

and it was again denied after a hearing by the state trial judge pursuant to the new rule. The plaintiff then moved for the convening of a three-judge constitutional court and requested that it declare the pro hac vice rule unconstitutional on its face and as applied to plaintiff's out-of-state counsel, and enjoin its enforcement. After a full hearing, a majority of the three-judge constitutional court voted to abstain from deciding the constitutional questions presented, so that the State Supreme Court might be afforded the first opportunity to determine the proper construction of its own newly amended rule. This Court's instructions did not specify that only the statutory construction issue should be submitted to the State Supreme Court, or restrict the plaintiff from advancing his constitutional claims in that forum. The Court retained jurisdiction of the case pending the appeal, however, not as an appellate review court, but

solely as a precaution in case the appeal was dismissed as time-barred, or if the State Supreme Court elected to avoid deciding any constitutional issues which were presented to it. See Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) and Government Employees v. Windsor, 353 U.S. 364, 366 (1957).

However, the plaintiff did not accept this Court's abstention, but appealed directly to the United States Supreme Court, which affirmed the abstention judgment of the three-judge court. 411 U.S. 941. The case was then presented and argued before the Connecticut Supreme Court, which construed the term "good cause" as set out in the statute, not to enumerate the exclusive reasons for a finding of good cause. However, in a 4 - 1 decision, the Court did find that the State Superior Court was correct in concluding that the plaintiff's counsel had not assumed his minimal burden of presenting sufficient factual evidence to show

"good cause" under the statory [sic] requirements[2/]. 36 Conn. L.J. (No. 38, March 18, 1975) and 37 Conn. L.J. (No. 1, July 1, 1975). The one dissenting Justice, Bogdanski, would have ordered a remand of the case to the state trial court for a hearing, so that a proper factual record could be developed, upon which a basis could be established to make relevant factual findings.

The plaintiff filed no petition for certiorari nor did he seek direct review in the United States Supreme Court. Rather, the matter was renewed before this Court, under color of the Court's original order, wherein it retained jurisdiction, pending the final determination of the issues in the state's highest court.

Issues

1. Does the plaintiff have the right to return to this Court for an adjudication

of his federal claims, after failing to request final appellate review through an appeal to the United States Supreme Court; and

2. Assuming jurisdiction does exist, whether § 15A of the Connecticut Practice Book, so interferes with the plaintiff's right to the selection and effective assistance of legal counsel of his choice, that it is in conflict with the equal protection, the due process and the privileges and immunities clauses of the fourteenth amendment.

Jurisdiction

When the plaintiff briefed his appeal to the Connecticut Supreme Court and argued the case, he included federal constitutional issues of due process and equal protection. He represented the foregoing issues of law to be major premises in his appellate brief and intended them to be before the State Supreme Court for adjudication. However, that court

simply ruled that on the evidentiary record before it, as set out in the findings of the lower trial court, the plaintiff had not sustained his factual burden of proof of establishing the statutory prerequisites for admission. The State Supreme Court declined to review and consider the questions of constitutional law sought to be raised in the appeal, because none of these questions on which the plaintiff sought adjudication had been first presented and placed in issue at the trial court. Therefore, the State Supreme Court ruled that they were not properly before it pursuant to the requirements of § 223 of the Connecticut Practice Book.

Consequently, notwithstanding the fact that the plaintiff submitted his federal claims to the State Supreme Court to be litigated and in fact argued them to that court, since the latter declined to consider and decide those issues on their merits, it cannot be found that

the plaintiff is bound by a final adjudication of those federal questions in the state court. However, had he submitted the constitutional issues to the State Supreme Court without reservation, and had that Court decided them, whether or not the plaintiff later sought direct review of the state decision in the United States Supreme Court, he might have been considered to have waived any right to return to the District Court, as a matter of law.

> "The three-judge Federal District Court retained jurisdiction of this case while an authoritative construction of Chapters 33 and 36 was being sought in the Virginia courts . . . . The question of our jurisdiction arises because, when the case was last here, we observed that such abstention to secure state court interpretation 'does not, of course, involve the abdication [by the District Court] of federal jurisdiction, but only the postponement of its exercise . . . .' Harrison v. NAACP, 360 U.S. 167, 177. We meant simply that the District Court had properly retained jurisdiction, since a party had the right to return to the District Court, after obtaining the

> authoritative state court construction for which the court abstained, for a final determination of his claim. Where, however, the party remitted to the state courts elects to seek a complete and final adjudication of his rights in the state courts, the District Court's reservation of jurisdiction is purely formal, and does not impair our jurisdiction to review directly an otherwise final state court judgment." N.A.A.C.P. v. Button, 371 U.S. 415, 427 (1963).

The foregoing principles were reiterated and enlarged upon by the Court in England v. Medical Examiners, 375 U.S. 411, 419 (1964), where the Court said:

> "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then-whether or not he seeks direct review of the state decision in this Court-he has elected to forgo his right to return to the District Court." (Emphasis added).

Therefore, the Court finds that in light of the state court's action in not passing upon the constitutional issues, the plain-

tiff is not foreclosed from returning to this Court for the presentation of the federal issues for final review; and such procedure does not contravene the provisions of 28 U.S.C. § 1257.

Merits

The basic issue in this case is whether the new § 15A of the Practice Book, governing the admission of out-of-state attorneys pro hac vice, violates the plaintiff's right to select counsel of his choice. In other words, does the rule so restrict his choice of competent specialist counsel in the malpractice field, that his rights to equal protection and due process and his rights under the privileges and immunities clause of the fourteenth amendment are materially impaired.

The Supreme Court has commented on the subject, but had not defined with particularity the constitutional requirements govern-

ing the choice of counsel in civil cases. In Powell v. Alabama, the Court said:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may/not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." 287 U.S. 45, 69 (1932).

The issues to be litigated in the present state court action, wherein the plaintiff desires out-of-state counsel to represent him, do not involve a federal question, nor is it a suit authorized by the Congress to effectuate a basic public interest. The rules of law protecting the public from medical malpractice are created by state statutes and court precedent. The defendants argue that the state has a legitimate interest in the conduct of such litigation in its courts, and that the state properly requires that the attorneys handling the litigation have competent

knowledge of state law, procedural rules and state practice, and that the court have inherent disciplinary authority over them, to effectively maintain and enforce the standards of professional conduct required by all attorneys who practice before it. This primary authority to regulate the practice of law before the state courts has historically reposed in the states.

> "In Bradwell v. The State, 16 Wall. 130, it was held that the right to practise law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practise law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license." In Re Lockwood, Petitioner, 154 U.S. 116 (1893).

Also see, In Re Isserman, 345 U.S. 286, 287 (1953).

This principle was again affirmed and strengthened in Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), where the Court said:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 383 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124 (1961); Law Students Research Council v. Wadmond, 401 U.S. 154, 157 (1971)."

State rules and regulations governing the practice of law are ultimately subject to the mandates of the United States Constitution. Thus, under exceptional circumstances, where civil rights issues have been involved, the Supreme Court has placed limitations upon the

state's power to regulate the practice of law. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963); and Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964).

However, while the instant case has been awaiting final disposition in the state and federal courts, a new case concerning the same subject, Norfolk and Western Railway Company v. Beatty, 400 F.Supp. 234 (S.D. Ill. 1975), was summarily affirmed by the United States Supreme Court on December 8, 1975. 44 U.S.L.W. 3343. A summary affirmance by the highest court is binding upon this Court's decision in a like matter, provided the issues litigated and decided are substantially the same. In Hicks v. Miranda, 422 U.S. 332, 344 (1975), the Court said:

> "A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse

adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statutes was not a substantial one. The three-judge court was not free to disregard this pronouncement. As MR. JUSTICE BRENNAN once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .' . . . compare . . . C. Wright, Law of Federal Courts 495 (2d ed. 1970) ('Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.') The District Court should have followed the Second Circuit's advice . . . in Doe v. Hodgson, 478 F.2d 537, 539 (CA 2), cert. denied sub nom. Doe v. Brennan, 414 U.S. 1096 (1973), [that] the lower courts are bound by summary decisions by this Court '"until such time as the Court informs [them] that [they] are not."'" (Emphasis added).

Norfolk and Western, supra, concerned two railroad companies and five barge line companies regularly operating equipment in the

State of Illinois. They brought an action in the federal district court, alleging that for many years a substantial number of suits asserting rights under certain federal statutes-namely, The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq.; The Safety Appliance Acts, 45 U.S.C. §§ 1-50; The Merchant Marine Act of 1920 as amended (The Jones Act), 46 U.S.C. § 688-had been regularly filed against them in the Illinois courts.

Under federal law, Norfolk and Western and the other defendant common carriers were subject to suit by their employees seeking recovery under federally created substantive rights for job-related injuries, in the courts of any state where the employer transacted business. These suits could not be removed thereafter to a federal court, 28 U.S.C. § 1445(a); and in most instances the defendant-employer was forced into a judicial forum which was not of his own choosing. In fact,

in a large number of these actions, the accidents out of which the suit arose did not even occur within the State of Illinois. Accordingly, often the witnesses to the occurrence, the treating and examining physicians and the treating hospitals were located outside Illinois. All of the defendant common carriers were incorporated and their principal offices were in states other than Illinois. The only reason the suits could be brought in that jurisdiction was that the defendants operated their business in interstate commerce there. Prior to change in the Illinois courts' application of their pro hac vice rule, these railroad and barge companies were regularly represented in the Illinois state courts by retained specialist counsel possessed of special knowledge and experience in admiralty and railroad law, but licensed to practice outside the State of Illinois. They appeared as co-counsel and participated with in-state

counsel at all phases of the proceedings, including the actual trial.

A dispute arose when the state court judges struck from the list as trial attorneys, these specialist non-resident counsel and ordered the employer-defendants to retain Illinois licensed attorneys, who would be recognized by the court as the principal counsel to handle and try the case. The order did not totally bar out-of-state counsel from being associated in cases with local counsel, but only restricted their activity to a supporting, consulting, or advisory role at the trial.

The Norfolk and Western Railroad Company and its co-plaintiffs in the action resisted the restriction, claiming that because the rights involved had been federally created by statute, the state could not interfere with their selection of counsel and

thus impede the vindication of federally protected rights. For the state to so interfere, they argued, and limit these common carriers in their choice of counsel, ran contrary to the federal Supremacy Clause of Article VI. They also argued that such state action impaired the rights created by federal law and violated the equal protection, due process and privileges and immunities clauses of the fourteenth amendment, as well as the commerce-clause under Article I § 8, by laying an undue burden on interstate commerce. They claimed that these state restrictions were designed primarily to accomplish "a parochial desire to eliminate outside competition," and that they were not motivated by a vital and compelling state interest to maintain high standards of ethics and competency among those who practice law in the state courts. The case clearly raised the issue of whether or not a civil litigant's right to counsel was

subject to restriction by state rules governing the practice of law in state courts.

In Norfolk and Western Railway Company v. Beatty, supra, 400 F.Supp. at 237, the three-judge constitutional court's opinion, which was later affirmed by the Supreme Court, said:

> "The Illinois statute is not unreasonable. It is not a complete bar to out-of-state lawyers, but permits their full participation in isolated cases on a case-by-case determination."
>
> " . . . To view it otherwise would be for this Court to create a limited federal or national bar and to impose it on the states. To do so would be in total disregard of the state's great interests in the control and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission." (Footnote omitted).

It might be noted that the general tenor of that court's opinion strongly approved of the prior dissent by Smith, C.J., see 359 F.Supp. at 180, in the present case.

The Norfolk and Western decision might be distinguished from the present case on the theory that the Illinois rule did not completely bar out-of-state lawyers, whereas the Connecticut trial court's action in this case did. However, it should be pointed out, that the Connecticut Practice Rule, upon a proper showing, would have undoubtedly permitted the out-of-state counsel in the Norfolk and Western case to appear and try the case in Connecticut, merely because of clearly defined prior longstanding relationship. Compliance under the Connecticut rule could be accomplished by an evidentiary showing of "good cause," as defined in the State Supreme Court's opinion. The colloquy between counsel and the Connecticut trial court discloses that no adversary type of evidentiary presentation was ever made or attempted. Plaintiff's counsel appeared to presume that once Attorney Julien's name was presented with the request for ad-

mission, the trial court would automatically infer that his presence would confer benefits upon his client which would legally constitute "good cause."

The Court finds that the state courts do possess the inherent power to regulate who shall practice law before them; this is an essential authority to be exercised for the state court's own protection, as well as that of the litigants. While this Court might suggest a more liberal pro hac vice rule, those matters are for the state judiciary and not this Court. Absent proof of prejudice or abuse of discretion, the state courts must be presumed to act in good faith and with judicial wisdom, and must be permitted to exercise their regulatory powers freely. See Norfolk and Western Railway Company v. Beatty, supra; Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963); and Dandridge v. Williams, 397 U.S. 471, 478 (1970).

The defendants' motion to dismiss the action for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), is granted and so ordered.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court, pursuant to Rule 52(a), Fed. R. Civ. P. SO ORDERED.

Dated at Hartford, Connecticut, this 30th day of April, 1976.

J. Joseph Smith
United States Circuit Judge

T. Emmet Clarie
Chief United States District Judge

I dissent with opinion.

Jon O. Newman
United States District Judge

FOOTNOTES

1/ The record discloses that the named plaintiff Jerome Silverman, the administrator of the Estate of Harold Nathan, resigned as administrator in April 1972, during the pendency of this action, and that Nathan's widow, Adele Nathan, succeeded Silverman as administratrix, and in that capacity was substituted as successor plaintiff. Since the record retains the original title of the case, the Court will conform to that usage.

2/ "It then found that the plaintiff made no showing that the application was 'a special or infrequent occasion,' that the only reason given by the plaintiff in open court on the hearing on the application was that the plaintiff 'desired' Julien to represent him, that no factual showing was made by the plaintiff at the hearing that Julien's representation would affect the personal or financial welfare of his client that no showing was made at the hearing that the litigant was unable to secure the services of competent Connecticut counsel to try the case, and that the plaintiff failed to establish good cause under § 15A of the Practice Book." 36 Conn. L.J., No. 38, at 14.

APPENDIX B

NEWMAN, District Judge (dissenting):

The Court rejects plaintiff's claim on the authority of the Supreme Court's affirmance of the three-judge court decision in Norfolk and Western Railway Company v. Beatty, ____ U.S. ____ (1975), 44 U.S.L.W. 3343 (Dec. 9, 1975). With deference, I do not find that decision dispositive of the case before us. Norfolk and Western involved a constitutional challenge to a state practice rule which permitted out-of-state lawyers to participate "in isolated cases on a case-by-case determination." 400 F.Supp. at 237. The plaintiffs in that litigation thought the state could not limit their participation to such infrequent occasions. They were asserting the right to be represented by out-of-state counsel in all the F.E.L.A. cases pending against them in the state court. Our plaintiff desires out-of-state counsel in a single lawsuit. I can readily agree that the Constitution does not require a state court to permit out-of-state attorneys a right of regular appearance before the court, without qualifying for bar membership according to valid local rules. That is what Norfolk and Western decided. The issue before us is whether a state court that does permit out-of-state counsel to appear on infrequent occasion has in this instance rejected an application on grounds that deny the plaintiff client the equal protection of the laws.

The case has unfortunately become complicated by the prior course of proceedings both in this Court and in the Connecticut Supreme Court. The extent to which those proceedings are related and the extent to which they are not related must be clearly understood. The action of which the plaintiff complains in this Court was taken by a judge of the state Superior Court. That action, denying pro hac vice admission, was

properly challenged in this Court. See Silverman v. Browning, 359 F. Supp. 173, 179-80 (D. Conn. 1972)(concurring opinion).[1/] Ultimately this Court elected to abstain to afford the plaintiff an opportunity to obtain from the Connecticut Supreme Court a definitive construction of the out-of-state practice rule that might eliminate the federal constitutional issue. I did not think such construction would aid our resolution of the constitutional question, but agreed to abstention in order to effect a disposition of the case. 359 F. Supp. at 180. Normally, such abstention to seek clarification of state law propels the plaintiff into a new lawsuit in the state courts. Here, however, since the action being challenged in the federal suit had been taken by a state court trial judge in the course of pending litigation, the federal plaintiff sought to secure state court construction by appealing the

state trial judge's decision. Though appeal at that point was untimely, the Connecticut Supreme Court agreed in the interests of expedition to entertain the appeal and ruled authoritatively that § 15A permits pro hac vice admission whenever good cause is shown, and not simply when the conditions illustrated in the Rule are satisfied. Silverman v. St. Joseph's Hospital, 36 Conn. L.J. No. 38, 10, 15 (Conn. Supreme Ct. 1975).

Since the plaintiff did not reserve his federal question for subsequent determination by the federal court, his present claims would have been foreclosed from further litigation had the State Supreme Court ruled upon them. See England v. Medical Examiners, 375 U.S. 411 (1964). However, the State Supreme Court, though willing to hear the appeal out of time, felt obliged to invoke its rule precluding appellate consideration of issues not presented to the state trial court. To the

extent this refusal to adjudicate the federal constitutional issue also rested on the pendency of this federal court action, see 36 Conn. L.J. No. 38 at 12, it represents an unfortunate misunderstanding of abstention and the England doctrine. A federal court abstains to afford the state courts an opportunity to decide state law issues, and if the federal court plaintiff does not reserve the federal questions, there is absolutely no federal reason for a state court to decline to adjudicate the entire controversy. Doing so in this litigation would have ended it one year ago.

In any event, the State Supreme Court declined to decide the federal question, and plaintiff is not foreclosed from returning to this Court. But it is important to bear in mind that he returns to resume the litigation that was interrupted by this Court's abstention; he does not bring before us for

review any aspect of the decision of the State Supreme Court, as to which we have no appellate jurisdiction whatsoever. The only new ingredient in the lawsuit in this Court is the definitive construction of § 15A, a construction which, as I feared earlier, does not eliminate the constitutional question before us.

On the merits, I adhere to the views expressed previously, 359 F. Supp. at 177. Plaintiff's claim was rejected by the state Superior Court Judge for reasons that bear no rational relationship to any legitimate interests of the state in regulating the practice of law. The transcript of the proceedings in which the action here challenged was taken makes entirely clear the basis for the trial judge's action. He said he was denying the application because there had been no showing plaintiff had a long-standing relationship with the out-of-state counsel he

had selected, nor that Connecticut counsel were not available. The fact that he issued findings nearly a year later purporting to reject the application for lack of an adequate showing of good cause cannot change the facts concerning what he did when he denied the application and what he said were the reasons for denying it. See SEC v. Chenery, 318 U.S. 80, 87-88 (1943). Were the record ambiguous, the subsequent findings might provide a basis for clarification, but the record made at the time is too clear for subsequent restructuring.

For these reasons, and for those previously set forth, I would grant plaintiff the relief requested.

FOOTNOTE

1/ Arguably, the propriety of seeking relief from this Court during the pendency of the state court civil proceedings has been rendered in some doubt by the Supreme Court's limited extension of Younger v. Harris, 401 U.S. 37 (1971), to civil proceedings. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman involved a civil proceeding closely analogous to a criminal action, a circumstance totally lacking in this litigation. Moreover, if denial of admission of an attorney pro hac vice denies a state court litigant his constitutional rights, he faces uncertain vindication of those rights if he is limited to an appeal of the judgment ultimately obtained in the state court litigation. At that point, he might well be required to demonstrate prejudice by the denial of the attorney of his choice, although it is possible that an unconstitutional denial of the selected attorney would be grounds for reversal without speculative exploration of actual prejudice. In any event, Huffman has not extended Younger to all civil proceedings, and the ruling here challenged is sufficiently distinct from the routine conduct of the state court litigation to warrant federal court inquiry pursuant to 42 U.S.C. § 1983. Cf. Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 122 n.4 (S.D.N.Y. 1969) (Friendly, J.).

SUPREME COURT

December Term, 1974

JEROME SILVERMAN, ADMINISTRATOR (ESTATE OF HAROLD NATHAN) *v.* ST. JOSEPH'S HOSPITAL ET AL.

Application by the plaintiff for the admission of an out-of-state attorney as trial counsel pro hac vice in a medical malpractice action, brought to the Superior Court in Fairfield County at Stamford and denied by the court, *Tierney, J.*, from which denial the defendants appealed to this court. *No error.*

Marshall S. Feingold, for the appellant (plaintiff).

Gregory C. Willis, for the appellee (named defendant).

Dion W. Moore, for the appellee (defendant Louis D. Browning).

HOUSE, C. J. This appeal arose out of proceedings in a malpractice action brought against the named defendant and two physicians and returned to the Superior Court in Fairfield County on the first Tuesday of August, 1968. The record discloses that the named plaintiff, Jerome Silverman, the administrator of the estate of Harold Nathan, resigned as administrator in April, 1972, during the pendency of the action, and that Nathan's widow, Adele Nathan, succeeded Silverman as administratrix and in that capacity was substituted as successor plaintiff. Since, however, the record and briefs have all continued to retain the original title of the case, we will conform to that usage.

A preliminary and necessarily lengthy recital of the facts surrounding and giving rise to this belated appeal is essential to place in context the limited issue involved. In October, 1968, the plaintiff applied to the Superior Court for permission to allow Alfred S. Julien, a member of the New York bar and not a member of the bar of this state, to take pretrial depositions of the defendants in preparation for the trial of the malpractice case. Over the objection of the defendants, the court (*Bogdanski, J.*) granted the application. Subsequently, in May, 1969, in an action brought by the defendants herein as plaintiffs, the court (*Tierney, J.*) granted an order permanently enjoining Julien from participating in the taking of the depositions. In November, 1970, the plaintiff applied to the Superior Court for permission to allow Julien to try the case. This application was denied by the court (*LaMacchia, J.*). In March, 1971, the then administrator and Mrs. Nathan commenced an action in the United States District Court for the district of Connecticut seeking a permanent injunction restraining Judge LaMacchia and the other judges of the Superior Court in Fairfield County from continuing a policy or practice which prevented them from engaging the services of Julien as their trial counsel in the state court action. By way of affirmative relief, they also sought an order directing the Superior Court judges to permit Julien to try the cases pro hac vice on behalf of the plaintiff in association with Connecticut counsel and staying proceedings in the Superior Court until Julien received such permission. The defendants moved that the action in the federal court be dismissed. In April, 1971, the District Court (*Clarie, J.*) denied the defendants' motion to dismiss and found that the plaintiffs had

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been denied equal protection of the laws but deemed it proper to abstain from intervening and providing a remedy until such time as the state reviewed the matter and had "the opportunity to consider and establish an objective rule or benchmark in the Practice Act [sic] which would clearly set forth the rights of attorneys from other jurisdictions to practice *pro hac vice* in Connecticut's Courts." See *Silverman* v. *Browning*, 359 F. Sup. 173, 175 (D. Conn.).

On June 21, 1971, the judges of the Superior Court adopted § 15A of the Practice Book entitled "Attorneys of Other Jurisdictions Appearing Pro Hac Vice."[1] On April 13, 1972, the plaintiff, proceeding under the provisions of Practice Book § 15A, moved for Julien's pro hac vice admission to try the case. It is the court's decision on this motion which is the subject of the present appeal.

Prior to the hearing of the plaintiff's motion in the Superior Court, the defendants in the federal

[1] "[Practice Book] Sec. 15A. —ATTORNEYS OF OTHER JURISDICTIONS APPEARING PRO HAC VICE. An attorney who is in good standing at the bar of another state, the District of Columbia, or the commonwealth of Puerto Rico, may, upon special and infrequent occasion and for good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state; provided, however, that a member of the bar of this state must be present at all proceedings and must sign all pleadings, briefs and other papers filed with the court and assume full responsibility for them and for the conduct of the cause and of the attorney to whom such privilege is accorded. Where feasible, the application shall be made to the judge before whom such cause is likely to be tried. Good cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include a showing that by reason of a long standing attorney-client relationship predating the cause of action or subject matter of the litigation at bar, the attorney has acquired a specialized skill or knowledge with respect to the client's affairs important to the trial of the cause, or that the litigant is unable to secure the services of Connecticut counsel."

court action again moved in that court to dismiss that action claiming that the promulgation of § 15A of the Practice Book rendered it moot. That court (*Clarie, J.*), on April 19, 1972, denied the motion to dismiss, directed the federal court plaintiffs to proceed with all reasonable speed with the plaintiff administrator's pending motion in the Superior Court for the admission of Julien, directed that the federal court's order staying the action in the Superior Court remain in effect and ordered: "This court will retain jurisdiction in this suit pending the outcome of the application in the State Court for leave to the plaintiffs [sic] to have Alfred S. Julien appear as trial counsel *pro hac vice* in their [sic] action" and "[t]his matter may be brought on before this Court for further proceedings on the application of any party on notice to the others." On May 5, 1972, the Superior Court (*Tierney, J.*) denied the plaintiff's application for the admission of Julien under the pro hac vice rule, § 15A—the decision with which we are concerned on the present appeal.

Again the plaintiffs in the federal court action moved in that court seeking a final order granting the relief requested in their complaint—an injunction restraining the judges of the Superior Court from continuing a policy or practice which prevented them from having Julien as trial counsel in the Superior Court, an affirmative injunction directing the judges of the Superior Court to permit Julien to try the case, and an order staying the Superior Court action until Julien was admitted. They predicated their claims on the ground that § 15A of the Practice Book, on its face and as applied, was unconstitutional. They contended that the section contravened the due process and equal

protection clauses of the federal constitution as well as the first and sixth amendments. *Silverman* v. *Browning*, supra.

In December, 1972, a three-judge District Court decided the case, filing three separate opinions. *Silverman* v. *Browning*, supra. Judge Clarie in his opinion expressed the view that in denying the application filed pursuant to § 15A of the Practice Book the Superior Court misread the rule, in part, and ignored other pertinent provisions in certain respects. For these reasons and in the interests of federal-state comity, he was of the opinion that the Superior Court's decision should be reviewed by this court. *Silverman* v. *Browning*, supra, 175–77. Judge Smith was of the opinion that the action in the federal court should be dismissed for want of a substantial federal question. *Silverman* v. *Browning*, supra, 180. Judge Newman was of the opinion that § 15A of the Practice Book contravened the equal protection clause of the federal constitution and was clearly unconstitutional. *Silverman* v. *Browning*, supra, 177–80. In view of the fact, however, that one of his colleagues favored abstention and the other dismissal, he concluded (p. 180): "In these circumstances, and solely to assemble a majority disposition, I concur in the result reached by Judge Clarie to abstain to afford the Connecticut Supreme Court an opportunity for further consideration of plaintiffs' claim to employ counsel of their choice. While I do not believe such abstention is warranted in view of our obligation to decide constitutional questions properly brought before us, I fully share Judge Clarie's view that it would be desirable for the state courts to resolve this matter."

From this decision of the District Court, the plaintiffs in that court took a direct appeal to the United States Supreme Court which, on April 23, 1973, affirmed the decision of the District Court without oral argument or an opinion. *Silverman* v. *Browning*, 411 U.S. 941, 93 S. Ct. 1927, 36 L. Ed. 2d 406. Then on May 23, 1973, the plaintiff filed the present appeal to this court, claiming error in the May, 1972 judgment of the Superior Court denying the motion to admit Julien pro hac vice to argue this case on the trial.

As this recital of the background of this appeal indicates, the relatively simple issue presented by an appeal from the May, 1972 judgment of the Superior Court has been unnecessarily delayed, clouded and complicated. While it is true as stated by Judge Clarie in his decision of April 29, 1971, that "[t]his suit presents the delicate question of the right of a qualified and licensed out-of-state attorney to practice law in the state courts of Connecticut in a particular case," adjudication of that question has been delayed and complicated by the successful efforts of the plaintiff to persuade the federal District Court to assume jurisdiction to intervene and issue orders with respect to the conduct of a trial in a trial court of this state in a matter over which the state trial court had original jurisdiction and was exercising that jurisdiction and whose exercise of jurisdiction was, in case of error, subject to rectification by appeal to this court and from this court to the United States Supreme Court. Recognition of the fact that the state trial court had primary jurisdiction to decide the question of Julien's admission is implicit in the April 12, 1972 judgment of the District Court, which directed the plaintiffs to "proceed with all reason-

able speed with an application in the Superior Court action entitled: Jerome Silverman, as Administrator, etc., v. Louis D. Browning, et al., for the admission of Alfred S. Julien as trial counsel *pro hac vice*." Explicit in the same judgment was the order of the District Court which continued its order to stay other proceedings in the state court and its implied assumed jurisdiction of appellate review of such judgment as should be rendered by the Superior Court by its orders that "[t]his court will retain jurisdiction in this suit pending the outcome of the application in the State Court for leave to the plaintiffs to have Alfred S. Julien appear as trial counsel *pro hac vice* in their action" and that "[t]his matter may be brought on before this Court for further proceedings on the application of any party on notice to the others."

To the same effect was the decision of the three-judge District Court rendered December 4, 1972, after the decision of the Superior Court denying the plaintiff's application. The District Court this time directed the plaintiffs to proceed with all reasonable diligence to obtain in this court appellate review of the Superior Court judgment denying Julien's admission under the pro hac vice rule, continued the stay of the state court action, and again asserted that the three-judge District Court retained jurisdiction pending the final outcome of the appeal to this court. It further directed that the matter could be brought on before the District Court for further proceedings on the application of any party on notice. *Silverman* v. *Browning*, 359 F. Sup. 173, 177.

In many respects the situation is similar to that in *Spector Motor Services, Inc.* v. *Walsh*, 135 Conn. 37, 61 A.2d 89, and in *Hoblitzelle* v. *Frechette*, 156 Conn. 253, 240 A.2d 864. In the *Spector* case, this

court (p. 70) indicated that "[t]he trial court should not have decided whether the Corporation Business Tax Act was in violation of the United States constitution, because that question, as we have stated, is still before the federal courts for decision." A further comment from that case also seems appropriate in the present circumstances (p. 42): "The plaintiff might have secured in the courts of this state the very relief which . . . [he] sought in the District Court; and we refrain from comment upon the long delay which must ensue before a final settlement of the controversy can be reached, due to . . . [his] invocation of the jurisdiction of the federal courts." In the *Hoblitzelle* case, the District Court ordered an election in New Haven and there was a question as to whether § 9-167a of the General Statutes concerning minority representation applied to such an election. The District Court decided that the statute was not applicable. The United States Circuit Court of Appeals held that this decision was "premature" and that the question of the applicability of the statute should be presented if at all possible to the courts of the state for decision. *Montano* v. *Lee*, 384 F.2d 172 (2d Cir.). The District Court, however, retained jurisdiction pending a decision of the question by the state courts. The question was presented to this court on a reservation. This court noted, in *Hoblitzelle* v. *Frechette*, supra, 265: "It is the law of the case now pending in the District Court, as announced by the Court of Appeals, that the District Court has jurisdiction to decide the basic questions presented to us in the present case. It is the law of that case that any answer by us to the questions asked in the present action would be inconclusive on the District Court in the exercise of its retained jurisdiction." Noting the similarity to the

situation in the *Spector* case and that the District Court had retained jurisdiction for ultimate decision, this court refused to answer the reserved question, indicating that were we to answer the question propounded it would be the duty of the trial judge to conform his decision accordingly, and "[s]uch a result, affecting the rights of persons whose election is still pending and undetermined within the jurisdiction of the District Court, is unthinkable and could only lead to confusion, conflict of jurisdiction, and further litigation." *Hoblitzelle* v. *Frechette*, supra, 267.

As if the assumption of jurisdiction by the District Court and its retention of jurisdiction pending a decision by the state courts, which it directed the plaintiff to obtain, did not sufficiently confound the principal issue involved on this appeal, it is further confounded by the fact that the judgment from which the present appeal was taken was filed on May 5, 1972. If that judgment was a final judgment, then the time for filing the appeal was under the provisions of § 601 of the Practice Book limited to twenty days. If, on the other hand, the appeal is considered to be permissible under the provisions of § 604 of the Practice Book as a judgment disposing of part of the issues, it was incumbent upon the plaintiff to file notice of the appeal within twenty days. A notice of appeal was not filed until May 23, 1973—almost exactly a year late.

Despite the existence of all of these complications, we have, not without considerable hesitation and reluctance, decided to entertain the present appeal. Our decision is prompted by several considerations. Unlike the situation in the *Spector* and *Hoblitzelle* cases where the federal court had and exercised original jurisdiction and the later pro-

ceedings in the state court were thereafter undertaken at the direction of the federal courts which retained jurisdiction, in the present case it was the state trial court which had and was exercising original jurisdiction subject on appeal to review by this court, and it is the federal court which then chose, nevertheless, to intervene and interfere with the continuing exercise of state court jurisdiction. Paraphrasing what we said in *Hoblitzelle* v. *Frechette*, supra, 265: "The clear import of the District Court judgment is to assert complete direction and control of all aspects of . . . [the proceedings for the admission pro hac vice of Julien]. The plaintiffs . . . chose to invoke the jurisdiction of the District Court, and that court assumed jurisdiction even though the state courts were equally open to entertain the case [and were doing so]. *Scott* v. *Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 14 L. Ed. 2d 477. It is neither our province nor our wish, in this proceeding, to consider the assumption, the scope or the result of the exercise of that jurisdiction." In considering the merits of this appeal, we are merely exercising the undoubted appellate jurisdiction which this court has over the judgment of a trial court in this state. As to the remaining problems in connection with entertaining the appeal, the defendants have interposed no objection to its consideration by us and, in fact, have urged that the appeal be decided and an end be put to the six-year delay since the action was started so that they may at last have their day in court for a trial on the merits. The latter plea impels us, other problems notwithstanding, to proceed, pursuant to the provisions of § 762 of the Practice Book as amended, and "to facilitate business and advance justice," to decide the merits of the present appeal. Last in mention, although not last in importance, is our

regard for the decision of the United States Supreme Court in *Silverman* v. *Browning*, 411 U.S. 941, 93 S. Ct. 1927, 36 L. Ed. 2d 406, affirming the order of the District Court that the plaintiffs proceed to obtain appellate review in this court of the denial of Julien's admission under the pro hac vice rule of § 15A of the Practice Book.

We turn now to a consideration of the merits of the plaintiff's appeal. In limine, it is important to note that the administrator is the sole party plaintiff in these proceedings. Julien was not a party to these proceedings in the Superior Court and is not a party to this appeal, and there is no indication that he has ever attempted to intervene or present any claim in our courts that he has been denied any right. We are concerned solely with the plaintiff's claim of a right to have his case tried by an attorney who has not been admitted to the Connecticut bar, and Julien has asserted no claim of his own. The rule of jus tertii is fully applicable. *Tileston* v. *Ullman*, 318 U.S. 44, 46, 63 S. Ct. 493, 87 L. Ed. 603; *Mendez* v. *Mendez*, 160 Conn. 237, 278 A.2d 795. A litigant may only assert his own constitutional rights and immunities. *McGowan* v. *Maryland*, 366 U.S. 420, 429, 81 S. Ct. 1101, 6 L. Ed. 2d 393; *United States* v. *Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524.

The plaintiff's application pursuant to the provisions of § 15A of the Practice Book was entitled "Motion for Permission to Allow Attorney Alfred Julien of the New York Bar to Try This Case on Behalf of the Plaintiff as Provided for Under Section 15a of the Connecticut Practice Book, as Amended." It alleged the pendency of the malpractice case, that it was a difficult case to try, that the plaintiff had retained Attorney Julien of the New

York bar to handle the case, that Julien is one of the foremost medical malpractice trial attorneys in the United States and has tried numerous medical malpractice cases to successful conclusions, that he has had a great deal of experience, that the subject matter of the pending litigation is very technical in nature and difficult to prove and will require the services of an attorney who is familiar with the medical field, and that the plaintiff retained him to handle this case because of his expertise, and that the outcome of the case will "affect the financial welfare of the estate of the decedent." The application also recited that during the course of the trial the plaintiff's Connecticut attorney would be present, would be responsible for all pleadings, briefs and other papers, and would assume full responsibility for the conduct of the trial and of Julien.

From the court's denial of the application, the plaintiff filed the appeal to this court and, in accordance with the provisions of § 613 of the Practice Book, filed his request for finding and draft finding. Section 614 of the Practice Book[2] prescribes the form and contents of a draft finding under our practice. Essential requirements include "a statement, in consecutive, numbered paragraphs, of the relevant and material facts proven, the conclusions of the court, [and] the claims of law made in the trial court with the rulings of the court thereon."

[2] "[Practice Book] Sec. 614. FORM AND CONTENTS OF DRAFT FINDING. The draft finding shall contain, under separate headings, a statement, in consecutive, numbered paragraphs, of the relevant and material facts proven, the conclusions of the court, the claims of law made in the trial court with the rulings of the court thereon, and the ruling on evidence or other rulings on the trial which the appellant desires to have reviewed. The draft shall be in substantial conformity with Form 603, statements of rulings on evidence shall comply with Sec. 648, and appropriate references to pages of the transcript shall be made as provided in Sec. 641."

Because of the importance which attaches to what a party has actually proved as distinguished from what he has pleaded in one court or another, it is pertinent to examine the draft finding submitted by the plaintiff as his "statement . . . of the relevant and material facts proven" in support of his application and his "claims of law made in the trial court with the rulings of the court thereon." For this reason, we have printed in a footnote the entire draft finding[1] submitted by the plaintiff as his statement of what he claims to have proven to the trial court in support of his application. It is obvious from his own claim of what he proved in the trial court that the plaintiff submitted no evidence whatsoever of "good cause" for the pro hac vice admission of Julien except that he had retained Julien to handle the case. No claims of law made in the trial

[1] "FIRST: The following facts are found:

"1. The above captioned case was returnable to this Court on the first Tuesday of August, 1968.

"2. This case is a medical malpractice death action.

"3. The Plaintiff, Jerome Silverman, Administrator of the Estate of Harold Nathan, retained attorney Alfred S. Julien of New York City, a member of the Bar of the State of New York, to handle this case, and to take whatever action necessary to protect the Plaintiff's rights.

"4. The only state where this action could be instituted was the State of Connecticut.

"5. Attorney Alfred S. Julien referred this case to Attorneys Feingold & Fernino of Hartford, Connecticut for the purposes of instituting suit.

"6. Attorneys Feingold & Fernino brought suit on this case in the Superior Court for Fairfield County at Stamford on behalf of the Plaintiff, Jerome Silverman, Administrator of the Estate of Harold Nathan.

"7. By motion dated April 13, 1972, the Plaintiff, Jerome Silverman, Administrator of the Estate of Harold Nathan, moved for permission to allow attorney Alfred S. Julien, be admitted specially for the trial of this case, pursuant to Rule 15A of the Connecticut Practice Act.

"8. The Plaintiff's motion was denied by the court on May 5, 1972, after argument."

court by the plaintiff are printed for the reason that the draft finding contains none. Nor is there any indication elsewhere in the record that he ever made any.

The trial court filed a finding of fact with the conclusions it reached thereon. It referred to the pending malpractice case and found that the plaintiff had retained Attorney Julien of the New York bar to handle the case for him, that Julien had referred the case to Connecticut counsel for the purpose of instituting suit, that that counsel had brought suit, that the plaintiff had moved for permission to allow Julien to be admitted specially for the trial pursuant to § 15A of the Practice Book, and that the court had denied the motion after argument. It then found that the plaintiff made no showing that the application was "a special or infrequent occasion," that the only reason given by the plaintiff in open court on the hearing on the application was that the plaintiff "desired" Julien to represent him, that no factual showing was made by the plaintiff at the hearing that Julien's representation would affect the personal or financial welfare of his client, that no showing was made at the hearing that the litigant was unable to secure the services of competent Connecticut counsel to try the case, and that the plaintiff failed to establish good cause under § 15A of the Practice Book. On the basis of these facts, the court reached the following conclusions of law: The plaintiff did not establish any subordinate facts to support his application under § 15A of the Practice Book; the plaintiff presented no facts to warrant a conclusion that good cause under § 15A had been established; the mere fact that a client desires out-of-state counsel to represent him in the courts of this state is not sufficient reason, in and of itself, to warrant granting such permission; and

"'[g]ood cause' includes" showing that a pro hac vice permission given to an out-of-state attorney be in the best interests of his client, either personal or financial, and no such showing was made. In addition to these conclusions of law, the court stated: "The questions of law raised by the plaintiff in paragraphs 3 through 8 were never presented to this court, nor raised in plaintiff's application for motion [sic]. No review of such claims is therefore made." The reference is to six paragraphs contained in the plaintiff's request for finding. They are all in the form of questions asking whether the court in denying the plaintiff's application did certain things: (3) deny the plaintiff his rights under the due process clause of the fourteenth amendment to the United States constitution; (4) deny Julien his rights under the same due process clause; (5) deny the plaintiff his rights under the equal protection clause of the fourteenth amendment; (6) deny Julien his rights under the same equal protection clause; (7) deny the plaintiff his rights under the first amendment to the constitution as well as his rights under the privileges and immunities clause of the fourteenth amendment; (8) deny the plaintiff his rights under the sixth amendment to the United States constitution. It is significant to note again that Julien is not a party to these proceedings and that none of the questions which the plaintiff wanted "reviewed" on appeal was ever raised in the trial court for its consideration. It is also important to distinguish these "questions of law" contained in the plaintiff's request for a finding from "claims of law" presented on the trial of a case. Section 613 of the Practice Book provides that *after* a trial has been concluded an appellant shall submit his request for a finding which shall state "the questions of law which he desires

reviewed" on the appeal. "Claims of law," on the other hand, are claims of law made *during* a trial and before argument if counsel intends to raise any question of law which may be the subject of an appeal to this court. Practice Book § 223.[4] Claims of law, to receive consideration in this court, must have been raised in the trial court. Practice Book §§ 223, 652; *State* v. *Dukes*, 157 Conn. 498, 501, 255 A.2d 614; *Bigionti* v. *Argraves*, 152 Conn. 700, 701, 204 A.2d 408; *Housing Authority* v. *Pezenik*, 137 Conn. 442, 448, 78 A.2d 546. A party cannot present a case to the trial court on one theory and then ask a reversal in this court on another. *Arcari* v. *Dellaripa*, 164 Conn. 532, 537, 325 A.2d 280; Maltbie, Conn. App. Proc. § 305. As we have noted, the plaintiff filed no claims of law in the trial court, constitutional or otherwise, and admits in his brief on appeal that the due process and equal protection clause issues he has raised for the first time on appeal were "unarticulated premises of plaintiff's motion for Mr. Julien's admission under the pro hac vice rule." An "unarticulated" claim of law hardly complies with the requirement of § 223 of the Practice Book that any question of law which may be the subject of an appeal must be stated "distinctly" to the trial court.

The conclusions are inescapable both that no evidence whatsoever was submitted to the trial court to show "good cause" why the application to admit

[4] "[Practice Book] Sec. 223. RAISING QUESTIONS OF LAW In trials to the court, if counsel intends to raise any question of law which may be the subject of an appeal to the supreme court of errors, he must state the same distinctly to the court before his argument is closed, and in such time as to give the opposing counsel an opportunity to discuss the question, and must request the court to take note of the point. If this be omitted, it will not be the duty of the court to decide the question. Counsel shall present the questions of law in writing, unless the exigencies of the case render this impracticable."

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Julien pro hac vice should be granted and that no claim of any violation of any constitutional right of the plaintiff was ever submitted to that court. Under these circumstances, we find no error in the conclusions reached by the court and in its denial of the application.

While this decision on the merits of the appeal is conclusive of the matter before us and no further discussion is required, the crossruff aspects of the proceedings instituted by the plaintiffs in the federal court and the observations of that court in *Silverman* v. *Browning*, 359 F. Sup. 173, prompt us to further comment. Both Judge Clarie and Judge Newman in their opinions suggested that the Superior Court and counsel appearing before it had misread or misconstrued the provisions of § 15A of the Practice Book[5] to require as a condition precedent to the granting of a pro hac vice application that there be a showing of a preexisting attorney-client relationship or that no Connecticut counsel was available to try the case. In all fairness, it is to be noted that these observations were made in opinions filed on December 4, 1972, when the finding of the Superior Court (filed September 5, 1973) was not yet available, and were apparently based on their interpretation of some colloquy between the court and counsel during argument. See *Lemelson* v. *Kellogg Co.*, 440 F.2d 986 (2d Cir.). The Superior Court filed its finding pursuant to the provisions of § 619 of the Practice Book which require that the court set forth "all facts which the court finds proven which are claimed to be relevant and material to the questions of law raised, and, under separate headings, the conclusions drawn by the court from the facts found." As we have hereinbefore noted, the court found, inter alia, that the

[5] See footnote 1, supra.

plaintiff made no showing that the application, pursuant to § 15A, was a special or infrequent occasion so far as Julien was concerned, that the only reason given in support of the application was the "desire" of the plaintiff, and that the plaintiff failed to establish good cause under § 15A. Among the conclusions reached by the court were that the plaintiff presented no facts to warrant a conclusion that "good cause" under § 15A had been established; that the mere fact that a client desires out-of-state counsel is not sufficient reason, in and of itself, to warrant granting such permission and, most significantly, that "'[g]ood cause' *includes* showing that a *pro hac vice* permission given to an out of state attorney be in the best interests of his client, either personal or financial. No such showing was made." (Emphasis supplied.)

Based on the conclusive finding of the Superior Court, we cannot find that it misread or misconstrued the requirements of § 15A. The rule clearly states that a showing of "good cause" is a condition precedent to the granting of an application and that "[g]ood cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney." While the rule goes on to state that such facts "may include" the showing of a preexisting attorney-client relationship or the inability of the litigant to secure the services of Connecticut counsel, we do not construe the suggestion of these illustrations of relevant facts which permissibly "may" be shown as being exclusive criteria rather than examples of relevant circumstances affecting the personal or financial welfare of the client which may be proved. Nor do we conclude from the court's finding that it so misread or misconstrued the rule as to find that these were exclusive criteria rather than illustrative examples.

For all its ramifications, this case is essentially one where the trial court found that the plaintiff had not sustained his burden of proof, and we find that there was no error in that conclusion of the court.

There is no error.

In this opinion LOISELLE, MACDONALD, and LONGO, Js., concurred.

BOGDANSKI, J. (dissenting.) As properly noted in the majority opinion, "we are merely exercising the undoubted appellate jurisdiction which this court has over the judgment of a trial court in this state." That judgment is the denial by the Superior Court on May 5, 1972, of an application made pursuant to Practice Book § 15A. That is the only court action before us.

An examination of the entire record discloses (1) that the parties and the court misunderstood the procedure for making a § 15A application for admission of an out-of-state attorney to participate in the trial of a case before a court of this state, and (2) that the trial court misconstrued the provisions of that rule.

Section 15A expressly provides that the application is to be made by "a member of the bar of this state." See footnote 1 of the majority opinion. In this case, the application was made by the plaintiff through his Connecticut attorney. While this defect is not a matter of any substance, it is important to emphasize that such an application is not one brought by the litigant, but rather it is one that is brought by a member of the bar of this state and an officer of the court. See *In re Application of*

Plantamura, 149 Conn. 111, 113, 176 A.2d 61, cert. denied, 369 U.S. 872, 82 S. Ct. 1141, 8 L. Ed. 2d 275; *Heiberger* v. *Clark*, 148 Conn. 177, 186, 169 A.2d 652. As in an application for admission to the bar, there are no adversary parties in a technical legal sense when application is made for an out-of-state attorney to appear pro hac vice pursuant to § 15A. See *Heiberger* v. *Clark*, supra, 182. For those reasons it is not surprising that § 15A does not require an evidentiary hearing to establish the facts set forth in the application. The rule only calls "for good cause shown upon written application." Indeed, in this case the trial court did not take any evidence, and the parties "in opposition" did not dispute any of the facts set forth in the application. The finding of facts, therefore, by the trial court was not warranted. "We have repeatedly stated that a trial court should not make a finding of facts where it hears no evidence. The reason is that such a finding would add nothing to the record; indeed it might well cloud the issue. *Biz* v. *Liquor Control Commission*, 133 Conn. 556, 557, 53 A.2d 655; *Dion* v. *Dion*, 128 Conn. 416, 417, 23 A.2d 314." *Winchester Repeating Arms Co.* v. *Radcliffe*, 134 Conn. 164, 169, 56 A.2d 1. See Practice Book § 609; Maltbie, Conn. App. Proc. § 126.[1]

The only "facts" properly before us are the undisputed representations in the written application. The conclusions of the trial court are therefore tested by those representations of fact.

The application in relevant part states that the outcome of the plaintiff's malpractice case will "affect the financial welfare" of the decedent's

[1] It is, of course, proper to set forth in a finding the conclusions of the court and claims of law of the parties which do not appear on the face of the record, but there can be no "facts found" when no evidence is taken.

estate; that "the subject matter of the litigation at bar is very technical in nature and difficult to prove"; that "[A]ttorney . . . Julien . . . over the years has acquired a special skill or knowledge with respect to medical malpractice cases, which is important to the trial of the plaintiff's cause of action";[2] and that the "plaintiff retained . . . Julien to handle this case because of his expertise in the trial of medical malpractice cases."

The trial court concluded that the "plaintiff has presented no facts to warrant a conclusion that good cause under Rule 15A has been established." That conclusion is erroneous for two reasons. First, the application is made not by the plaintiff, but by "a member of the bar of this state." No evidence was presented because the veracity of the statements in

[2] The application set forth Julien's qualifications as follows: "Mr. Julien was admitted to the bar of New York in 1933 and is 'a veteran malpractice attorney' (opinion of federal court injunction dated April 29, 1971, page 2). In addition, he has participated in a joint symposium held by the Hartford County Bar Association and Hartford County Medical Association, on May 11, 1970, at the Hartford Hilton Hotel, on a malpractice seminar, and he has lectured widely on the subject of malpractice to both bar associations and medical groups in New York, New Jersey, Michigan, Tennessee and California. He has tried malpractice cases in the state courts of New York, California, Wisconsin and New Jersey and the Federal District Court in Philadelphia, Pennsylvania, in each case by special permission of the court; he has written articles on the subject of medical malpractice and some of these articles have been published in medical and legal journals. He has conducted courses in medical malpractice for practicing attorneys in New York and New Jersey, and he has been President of the American Trial Lawyers Association, President of the New York State Trial Lawyers Association, and is currently President of the Metropolitan Trial Lawyers Association, and has been admitted to practice, in addition to the New York Bar, in the United States District Court for the Southern District, New York, the Eastern District, New York, the District of Columbia, the Eastern District, Maryland, the United States District Court, District of Connecticut, and the United States Circuit Court of Appeals for the Second Circuit."

the application was undisputed. Second, the application arguably shows "good cause" under § 15A because "circumstances affecting the . . . financial welfare of the client" are set forth.

In ruling on the application the trial court stated: "The two principal bases on which he would be permitted here apparently are not present, are they? He [Julien] has no long standing attorney-client relationship, and although he has a specialized skill, the litigant is certainly not unable to secure the services of Connecticut counsel who have the same skill." The two principal bases referred to by the trial court are examples given in § 15A of what "may" constitute "good cause." Those examples are not exclusive, as the trial court apparently believed, but are merely illustrations of facts or circumstances affecting the personal or financial welfare of the client.[3]

I would therefore find error and remand the case with direction to reconsider the application.

APPENDIX D

SUPREME COURT

June Term, 1975

JEROME SILVERMAN, ADMINISTRATOR (ESTATE OF HAROLD NATHAN) *v.* WALTER A. CAMP ET AL.

Action for malpractice, brought to the Superior Court in Fairfield County at Stamford where a motion by the plaintiff for an order permitting an out-of-state attorney to try the action was denied by the court, *Tierney, J.*; from this denial the plaintiff appealed to this court. *No error.*

Marshall S. Feingold, for the appellant (plaintiff).

Walter M. Pickett, Jr., for the appellee (named defendant).

APPENDIX E
ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-vs-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Defendants.

Civil No. B-259

.....

.....IT IS ORDERED that:

The plaintiffs' motion for admission of Alfred S. Julien, pro hac vice, to practice before the Superior Court under Rule 15(a) of the Connecticut Practice Book is denied without prejudice to its

being renewed after the State Supreme Court has acted with finality on the issues presented herein. The plaintiff shall proceed with all reasonable diligence to obtain appellate review in the State Supreme Court.

The stay heretofore granted shall remain in effect so that the status quo of the state actions will not be prejudiced.

This Court will retain jurisdiction pending the final outcome of the plaintiffs' appellate application to the State Supreme Court.

The matter may be brought on before this Court for further proceeds on the application of any party and on notice to the others.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of December, 1972.

T. Emmet Clarie
United States District Judge

Concurring in result with separate opinion.

Jon O. Newman
United States District Judge

I dissent with opinion

J. Joseph Smith
United States Circuit Judge

Entered December 14, 1972.*

*The foregoing order appears in the concluding portions of the majority opinion of the District Court.

MAJORITY OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-vs-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Defendants.

Civil No. B-259

BEFORE: Smith, Circuit Judge, Clarie and Newman, District Judges.

MEMORANDUM OF DECISION

Clarie, D.J.

This civil rights action has been brought pursuant to 42 U.S.C. § 1983. The

plaintiffs are Jerome Silverman, a New York State resident, who is suing as Administrator of the Estate of Harold Nathan, and Adele Nathan, the decedent's wife, who is a Connecticut resident. The Judges of the Superior Court of Fairfield County are named as defendants in this action, as well as those defendants named in the two state court civil actions, No. 15,983 and No. 15,991, which are still pending in the Superior Court of Fairfield County. The plaintiffs allege that the Connecticut procedure for admission pro hac vice of attorneys not regularly admitted as members of the Connecticut Bar violates the first, sixth, and fourteenth amendments to the United States Constitution. Jurisdiction is grounded upon 28 U.S.C. § 1343 (3) and, because injunctive relief has been requested, a three judge panel has been

convened pursuant to 28 U.S.C. § § 2281 and 2283. A brief recitation of the history of the case is essential to a full understanding of its present posture.

On May 9, 1968, the plaintiffs engaged Attorney Alfred S. Julien, a New York medical malpractice specialist, as trial counsel to prosecute in the Connecticut state courts a claim for malpractice and negligence alleged to have been committed upon the plaintiff's decedent on November 7, 1967. Since Attorney Julien was not a member of the Connecticut Bar, he retained Connecticut counsel to prepare all of the papers and pleadings. It was intended that Attorney Julien would conduct depositions and the trial with local Connecticut counsel present. In October of 1968, a motion was filed in Superior Court by Connecticut counsel, requesting that Attorney Julien be permitted to take the deposition of one of the defendants in the case. This motion was granted.

However, in May of 1969, an order was issued by the Superior Court permanently enjoining Julien from "taking, participating in, assisting in or aiding and assisting other counsel at the taking of the depositions." In November of 1969, Julien was denied permission to try the state court malpractice and negligence actions.

In response to this denial, the plaintiffs sought relief in this Court, alleging a violation of their constitutional rights to counsel and to equal protection under the law. The District Court Judge held in a memorandum filed April 29, 1971, that there existed at that time an "inconsistent non-system" of admitting attorneys to practice pro hac vice, wherein admission was dependent upon the absence of objection from opposing counsel and the subjectivity of individual Superior Court Judges. While the Court found that a denial of equal protection existed under the non-rule, the Court abstained, stating in part:

"Both justice and comity for the state court system require that the state be afforded the opportunity to consider and establish an objective rule or benchmark in the Practice Act which would clearly set forth the rights of attorneys from other jurisdictions to practice pro hac vice in Connecticut's courts."

In response to this Court's decision, Rule 15 (a) of the Connecticut Practice Act was promulgated and adopted by the Rules Committee[1] of the Connecticut Superior Court, effective September 1, 1971. That rule provides as follows:

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1) Numerous Connecticut decisions recognize "the inherent right of the Superior Court, a constitutionally established tribunal, to promulgate rules for the admission of attorneys." State Bar Association v. Connecticut Bank & Trust

"An attorney who is in good standing at the bar of another state, the District of Columbia, or the Commonwealth of Puerto Rico, may, upon special and infrequent occasion and for good cause shown upon written application presented by a member of

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(footnote continued from preceding page) Co., 145 Conn. 222, 231-233 (1958). See also Stanley v. City of Hartford, 140 Conn. 643, 646 (1954); In re Appeal of Dattilo, 136 Conn. 488, 492 (1950). Public Act (1957 Session) No. 651, § 7, also recognizes the authority of the Chief Justice of the Connecticut Supreme Court to convene conferences of the Judges of Connecticut Courts for consideration of matters relating to judicial business.

the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state; provided, however, that a member of the bar of this state must be present at all proceedings and must sign all pleadings, briefs and other papers filed with the court and assume full responsibility for them and for the conduct of the cause and of the attorney to whom such privilege is accorded. Where feasible, the application shall be made to the judge before whom such cause is likely to be tried. Good cause for according such privilege shall be limited

to facts and circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include a showing that by reason of a long standing attorney-client relationship predating the cause of action or subject matter of the litigation at bar, the attorney has acquired a specialized skill or knowledge with respect to the client's affairs important to the trial of the cause, or that the litigant is unable to secure the services of Connecticut counsel."

The defendants then moved to dismiss the plaintiffs' action and to terminate this Court's jurisdiction. After a hear-

ing, the Court denied the motion and directed that the plaintiffs proceed with all reasonable speed to petition the State Superior Court for the admission of Alfred S. Julien as trial counsel, pro hac vice under the new Rule 15(a). Pursuant to that order, a petition was accordingly filed. The petition was denied on May 5, 1972, and no appeal was taken from that ruling. The transcript of the hearing proceedings indicates that counsel for the plaintiffs and opposing counsel assumed that the word "may" in the last sentence of the rule was intended to be exclusive rather than illustrative; and that "good cause" required either the showing of a long standing attorney-client relationship or the unavailability of Connecticut counsel. Failing to consider the precise meaning

of the third sentence of Rule 15(a) which provides that "good cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney," the Court focused only upon the justifications for, and applicability of, these two criteria.

There is no indication in the record that either counsel or the Court considered that the existence of a long-standing attorney-client relationship was merely one criterion which might affect the personal welfare of the client; and that the unavailability of competent local counsel was simply one circumstance affecting a client's welfare, financial or otherwise. Assuming, arguendo, that this were found to be true, it is doubtful

that a constitutional issue would remain. In any event,a United States Court is not the proper forum in which to determine initially whether there exists "good cause," within the meaning of a recently promulgated rule, which may well be susceptible to a constitutionally acceptable construction in the State courts.

This Court is not unmindful of the delay, expense, and inconvenience which abstention often entails. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 425 (1963); 1 Barron & Holtzoff (Wright ed.), § 64 pp. 343-344; Wright, Law of Federal Courts, § 52, p. 198. But neither is it unaware that nothing could be more irksome to the State of Connecticut and destructive of harmonious federal-state relations than a premature

constitutional decision in such a sensitive area of the law. Ascertainment of whether there exist special circumstances, which warrant invocation of the Abstention Doctrine, must be made on a case by case basis, Baggett v. Bullitt, 377 U.S. 360, 375 (1963), bearing in mind that no principle of "our federalism" has found clearer or more consistent expression than that which dictates

> "...(t)hat the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959).

Until such an opportunity has been afforded and the law's actual, as opposed to theoretical, impact upon the litigants is known, Publice Utilities Comm'n of California v. United States, 355 U.S. 535, 539 (1957), abstention is required. Reetz v. Bozanich, 379 U.S. 82, 85-87 (1969); Fournais v. Ridge Tool Co., 400 U.S. 41 (1970); Askew v. Hargrave, 401 U.S. 476 (1970); Mitchum v. Foster, 407 U.S. 225 (1972).

The fact that the plaintiffs have failed to meet the requirements of § 604 of the Connecticut Practice Book (1970 Supplement) which requires that notice of appeal be filed within twenty (20) days of a judgment is not critical, for § 762 of the Practice Book further provides,

"(1) The design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice.

"(2) In the interest of expediting decision, or for other good cause shown, the supreme court may suspend the requirements or provisions of any of these rules in a particular case or application of a party or on its own motion."

This section provides a direct and uncomplicated approach through which it may be promptly determined whether an authoritative state court interpretation will be

forthcoming to resolve an issue arising out of a state judicial rule.

Neither Monroe v. Pape, 365 U.S. 167 (1961) nor McNeese v. Board of Education, 373 U.S. 668 (1963) was intended to abrogate "the historic rule...that suits in equity shall not be sustained in the courts of the United States 'in any case where a plain, adequate, and complete remedy may be had at law.'" Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967). Moreover, the United States Supreme Court has recently stated:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action

> under color of state law, 'whether that action be executive, legislative or judicial.'....And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights....
>
> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."

Mitchum v. Foster, 407 U.S. 225, 242-243 (1972).

The absence of special circumstances making delay intolerable and the existence of a prompt and efficient means by which it may be ascertained whether the state remedy is as adequate in practice as it appears in theory demand that the State Supreme Court be given a fair opportunity to construe Rule 15(a). This is especially true in the present case, since plaintiffs' counsel could have avoided such delay had he followed the simple expedient of a timely appeal to the State Supreme Court and received either a final adjudication or a denial of the availability of state procedure.

Accordingly, IT IS ORDERED that:

The plaintiffs' motion for admission of Alfred S. Julien, pro hac vice, to practice before the Superior Court under Rule

15(a) of the Connecticut Practice Book is denied without prejudice to its being renewed after the State Supreme Court has acted with finality on the issues presented herein. The plaintiffs shall proceed with all reasonable diligence to obtain appellate review in the State Supreme Court.

The stay heretofore granted shall remain in effect so that the status quo of the state actions will not be prejudiced.

This Court will retain jurisdiction pending the final outcome of the plaintiffs' appellate application to the State Supreme Court.

The matter may be brought on before this Court for further proceeds on the application of any party and on notice to the others.

SO ORDERED.

Dated at Hartford, Connecticut,

this 7th day of December, 1972.

T. Emmet Clarie
United States District Judge

Concurring in result with
separate opinion.

Jon O. Newman
United States District Judge

I dissent with opinion

J. Joseph Smith
United States Circuit Judge

Entered December 14, 1972.

OPINION CONCURRING IN RESULT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-vs-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J. P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Defendants.

BEFORE: Smith, Circuit Judge, Clarie and Newman, District Judges.

NEWMAN, District Judge (concurring in the result):

In this case, posing significant and interesting substantive and procedural questions, I find myself in disagreement with each of the differing views expressed by the other members of this three-judge

court.

The plaintiffs seek to employ an out-of-state attorney to appear on their behalf pro hac vice in civil litigation in the Connecticut Superior Court. If Connecticut barred all attorneys from appearing in state courts unless they were regular members of the Connecticut bar, the issue would be whether such regular bar membership (through examination or otherwise) may constitutionally be made a requirement to defeat the claim of a litigant to employ an attorney duly licensed in another state to represent the litigant in a particular case. But Connecticut has not denied all civil litigants the right to employ out-of-state counsel. On the contrary, Connecticut has adopted a rule specifying the circumstances under which a non-resident attorney who is in good standing in the bar of another state may represent a civil litigant in the

courts of this state. The issue on the merits in this case is whether Connecticut may constitutionally use the classifying criteria of Rule 15(a) to distinguish between those non-resident attorneys a civil litigant may employ and those he may not.[1/]

While this case does not require decision as to whether there is a constitutional right to an out-of-state attorney, plaintiffs do assume, and properly so, that there is a right to select counsel of one's choice free of unconstitutional limitations. I think the existence of that right is unassailable. In his prior decision in this case Judge Clarie ruled that choice of out-of-state counsel was entitled at least to protection against arbitrary denial, and that the "inconsistent non-system" which had prevailed in the absence of an "objective rule" denied equal protection of the laws.

Surely there would be no doubt of the substantiality of the question presented if a state permitted the pro hac vice admission of some out-of-state attorneys but denied admission to those who are members of a particular race or religion or who were identifiable by some other characteristic totally unrelated to any legitimate interest the state has in regulating the practice of law.

Thus for me the precise question on the merits is whether the criteria of Rule 15(a) are sufficiently related to a state's legitimate interests in regulating the practice of law to pass muster under the equal protection clause. Even on the assumption that the proper test is whether the rule's criteria are rationally related to the state's legitimate interests rather than supported by a compelling state interest, Rule 15(a) poses a substan-

tial question of validity.

Judge Clarie prefers to abstain from deciding that question now for several reasons, including the possibility that a state construction of the rule may avoid the constitutional issue raised. The construction adopted by Judge Tierney in the Superior Court is that pro hac vice admission may be granted only where a long-standing attorney-client relationship predating the litigation has enabled the attorney to acquire a specialized skill or knowledge of the client's affairs important to the trial, or where the client is unable to secure the services of Connecticut counsel. Judge Clarie suggests that the rule could more appropriately and more literally be read to permit pro hac vice admission upon any showing of "good cause....limited to facts and circumstances affecting the personal or financial welfare of the client"

rather than upon fulfilling either of the two illustrative grounds which Judge Tierney appears to have made exclusive.

I do not believe either construction of the rule will avoid the constitutional issue. In determining whether the rule establishes criteria rationally related to the state's legitimate power in regulating bar admission, we must identify the interest for which the state is entitled to exercise its power. That interest has already been identified by the Supreme Court. "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

I doubt that under either construction of the state's rule the criteria for distinguishing between who is admitted and who is not have a rational connection with the applicant's fitness or capacity to practice law. While possession of a specialized skill might well be rationally related to an applicant's fitness, the Connecticut rule recognizes specialized skill only when it is the result of a long-standing attorney-client relationship. The attorney these plaintiffs wish to employ has a recognized skill in a special area of the law--malpractice litigation. Whether that skill was acquired in prior representation of these plaintiffs or other litigants is entirely unrelated to his capacity to practice law.[2/]

Similarly, the litigants' ability to secure the services of Connecticut counsel is entirely unrelated to the qualifications of the out-of-state attorney they wish to

employ. The rule fares no better under the broader reading which makes admission turn on the presence of good cause limited to the welfare of the client. This standard is not a measure of the attorney's fitness or capacity to practice law. Of course the client's welfare is better served if his attorney is well qualified, but the "good cause" test of Rule 15(a) does not purport to be a basis for determining degree of qualification. There is no dispute here concerning the qualifications of the attorney plaintiffs wish to employ.

I recognize that in addition to assuring high standards of qualification in admitting attorneys, a state is entitled, in regulating the practice of law, to protect other interests such as assuring that the applicant will submit himself to the disciplinary power of the court and will

cooperate with the court in the expeditious handling of litigation. But neither the two grounds of the rule as interpreted by Judge Tierney nor the broader "good cause" reading suggested by Judge Clarie bear any relation to these interests. I therefore see no need to await further state court construction of the rule.

Nor do I agree that either considerations of comity or equity jurisdiction provide a basis for declining now to decide the merits of plaintiffs' claim. While this suit arises in the middle of state court litigation, it does not present the kind of comity considerations that ought to persuade a federal court to hesitate before ruling upon the constitutional claim. As Judge Friendly has pointed out, those considerations are applicable when a state court defendant asks a federal court to block an action against

him, not when a state court applicant for bar admission seeks federal court aid to eliminate an unconstitutional roadblock created by the state. Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 122, n. 4 (S.D. N.Y. 1969). Comity considerations are equally inapplicable where state court litigants seek federal court aid to eliminate what they claim is an unconstitutional roadblock to securing counsel of their choice.

In the absence of unresolved state law issues that might end the controversy, no plaintiff is required to exhaust state judicial remedies when claiming in federal court that his request to obtain the services of a qualified professional has been unconstitutionally denied by a state agency with professional licensing reponsibility. If the plaintiffs claimed they had been unconstitutionally denied the right to select an

out-of-state doctor or architect, decisions of the Supreme Court on other civil rights claims would preclude our requiring exhaustion of state judicial remedies. Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Demico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). The fact that the state agency which has denied these plaintiffs' alleged constitutional right happens to be a state trial court is coincidental as far as comity considerations are concerned. We should no more require exhaustion of judicial remedies than if the decision adverse to these plaintiffs had been rendered by a state commission on out-of-state attorneys.

As to the restraints on a court of equity, outlined in Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967), that decision

reckoned only with Monroe and McNeese and not with the later decisions in Demico, Houghton, and Wilwording. The Second Circuit has since come to recognize the force of these later decisions in Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972), cert. granted sub nom. Oswald v. Rodriguez, 407 U.S. 919 (1972).[3] If a prisoner can bring his § 1983 claims here without pursuing state judicial remedies, I see no reason to deny similar opportunity to these plaintiffs.

Since the other two members of this panel are divided, with one favoring abstention and the other dismissal, my preference for reaching the merits of the case now would leave the case without a disposition. In these circumstances, and solely to assemble a majority disposition, I concur in the result reached by Judge Clarie to abstain to afford the Connecticut Supreme Court an opportunity for further consideration of

plaintiffs' claim to employ counsel of their choice.[4] While I do not believe such abstention is warranted in view of our obligation to decide constitutional questions properly brought to us, I fully share Judge Clarie's view that it would be desirable for the state courts to resolve this matter.

FOOTNOTES

1/ Neither Martin v. Walton, 368 U.S. 25 (1961), nor Suffling v. Bondurant, 339 F.Supp. 257 (D. N.M.), aff'd sub nom. Rose v. New Mexico Board of Bar Examiners, ___ U.S. ____(Nov. 20, 1972), casts doubt on the substantiality of this issue. Martin upheld a Kansas requirement that a member of the bar of another state who regularly practices in such other state may practice before the Kansas courts only if he has associated with him as attorney of record a member of the Kansas bar. Plaintiffs do

not question Connecticut's power to impose such a requirement and have in fact complied with it. Suffling upheld a New Mexico requirement that applicants for admission to the bar must be state residents for at least six months. The lower court had found this requirement to be a reasonable period for the bar examiners to investigate the morals and character of bar applicants. 339 F.Supp. at 260. In this case Connecticut has not sought to specify any period of state residence to afford opportunity for investigation of the attorney plaintiffs wish to employ. If the criteria of Rule 15(a) are met, Connecticut is apparently willing to accept the non-resident attorney's membership in good standing in his home state bar as adequate evidence of his fitness. What remains in issue is the validity of the rule's criteria.

2/ The arbitrariness of using such a factor is evident whether Rule 15(a) is viewed as distinguishing between the attorneys these plaintiffs may employ and those they may not, or between civil litigants who may hire this attorney and civil litigants who may not.

3/ See also Russo v. Central School District No. 1, ____F.2d____, n. 5 (2d Cir. Nov. 14, 1972): "Of Course exhaustion of state judicial remedies is not a predicate to a federal court's jurisdiction in a § 1983 claim, Monroe v. Pape, 365 U.S. 167 (1961); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972)."

4/ The result thus reached is somewhat anamolous in that this Court is abstaining to permit state appellate consideration of plaintiffs' claim yet is

simultaneously enjoining the pending state wrongful death litigation. My preference would be to decide plaintiffs' claim promptly and thereby avoid the need to delay the state wrongful death action, but if comity is to be invoked to give the Connecticut Supreme Court further opportunity to resolve this problem, it does not seem inappropriate to require the Connecticut Superior Court to wait for the answer.

Entered December 14, 1972.

THE DISSENTING OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEROME SILVERMAN, as Administrator of of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-vs-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA, ST. JOSEPH'S HOSPITAL, THE HONORABLE J.P. RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford, Conn.,

Defendants.

Civil No. B-259

SMITH, Circuit Judge (dissenting):

I dissent. I would dismiss this action for want of a substantial federal question. See Martin v. Walton, 368 U.S. 25 (1961); Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M.), aff'd sub nom. Rose v. New Mexico Board of Bar Examiners, ____

U.S.____, 41 U.S.L.W. 3282 (Nov. 20, 1972). The admission to practice before the state courts in ordinary civil actions before them is a matter for those courts, with which we should not unnecessarily interfere, It may well be that the Superior Court has construed the new rule too narrowly, and it may be that a more liberal admission policy more in tune with modern specialization and mobility would be desirable. See Admission of Non-Resident Attorneys Pro Hac Vice, American Bar Foundation, Research Memo, Series 1 (1968). But that is a matter for state policy determination. I cannot agree that there is demonstrated any violation of any constitutional right of the plaintiff to be represented by counsel here by denial of permission to an out-of-state lawyer who does not seek admission to the Connecticut bar, to conduct proceedings in a malpractice civil action

in Connecticut courts. The Sixth Amendment's right to counsel in criminal cases which is enforced against the states under the Fourteenth Amendment is not directed to civil actions. Any constitutional claim must therefore be founded either in due process, privileges and immunities, or equal protection clauses of the Fourteenth Amendment, none of which so far as I can ascertain has been held to grant to a civil litigant, patient or other client the right to compel the admission of non-residents to the practice of law, medicine, or other professions within a state. Moreover, even if such a claim should be held valid under the Fourteenth Amendment and 42 U.S.C. § 1983, it would appear that plaintiff's proper relief is by an appeal to the State Supreme Court, either from denial of the motion or from judgment in the malpractice action, and if necessary by certiorari to the United States Supreme Court. Our powers to stay state court proceedings are limited by statute,

28 U.S.C. § 2283, and by precedent. While §1983 actions constitute an exception to the general § 2283 prohibition, Mitchum v. Foster, 407 U.S. 225 (1972), if we cannot interrupt state proceedings when a defendant claims that a prosecution constitutes a serious violation of First Amendment rights, see Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971), I can perceive no reason for doing so here in a civil damage action.

Mitchum, supra, makes it quite plain that although the § 2283 prohibition is not an absolute bar, traditional notions of comity and equitable jurisdiction still prevail. Comity requires some showing of immediate and irreparable harm before state proceedings will be enjoined. The showing here is far short of that requirement. At

best, Julien's claim is that the client much prefers Julien to indigenous talent. There is not claimed here any denial to the client of the right to be heard by any counsel qualified under the rules of the court. There is no claim of inability to obtain qualified counsel because of local, race or other prejudice or of any denial of the First Amendment right of association of similarly situated litigants. Cf. NAACP v. Button, 371 U.S. 415 (1963); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

I would therefore not merely abstain, but would dismiss this action for injunctive and other relief for want of a substantial federal question.

Entered December 14, 1972.

APPENDIX F

411 U.S. 941 93 S.Ct.1927(1973)

Jerome SILVERMAN, as Administrator of the Estate of Harold Nathan, et al., appellants, v. Louis D. BROWNING et al. No. 72-1234.

Appeal from the United States District Court for the District of Connecticut.

Facts and opinion, 359 F.Supp. 173.

April 23, 1973. Judgment affirmed.

Mr. Justice DOUGLAS would note probable jurisdiction and set case for oral argument.

APPENDIX G
OPINION OF U.S.D.J. CLARIE ON CONSTITUTIONALITY OF PRO HAC VICE PRACTICE PRIOR TO RULE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------x

JEROME SILVERMAN, as Administrator of the Estate of HAROLD NATHAN and ADELE NATHAN,

Plaintiffs,

-against-

LOUIS D. BROWNING, JAMES E. CRANE, WALTER A. CAMP, JOHN J. CLOONAN, GERALD A. SAVA. ST. JOSEPH'S HOSPITAL, THE HONORABLE JP RYAN, CLERK OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, FAIRFIELD COUNTY, STAMFORD, CONN., JUDGE OTTO H. LA MACCHIA and all the Judges of the Superior Court in Fairfield County, Stamford,Conn.,

Defendants.,

----------x

Civil No. B-259

RULING ON PLAINTIFFS'MOTION FOR TEMPORARY INJUCTION

This suit presents the delicate question of the right of a qualified and licensed out-of-state attorney to practice law in the state courts of Connecticut in a particular case. Plaintiffs

contend that this denial of the right to practice pro hac vice reaches constitutional dimensions requiring injunctive relief, where the lawyer of their choosing has been barred from participating in their state court action brought to recover under the wrongful death statute. This Court finds that the plaintiffs have been denied the equal protection of the laws; however, the Court deems it proper to abstain from intervening and providing a remedy, until such time as the State's Supreme Court has reviewed the matter and been given an opportunity to correct the illegality.

On May 9, 1968, Alfred S. Julien, an attorney licensed to practice law in the State of New York, was engaged by plaintiffs to prosecute a claim for

malpractice and negligence alleged to have been committed upon one Harold Nathan by certain of the defendants, the named hospital and the attending physicians. Two actions were then commenced in the Superior Court for the State of Connecticut, in Fairfield County, at Stamford, Connecticut, by Connecticut counsel retained by Attorney Julien. The latter, a veteran malpractice attorney, attempted to appear as trial counsel in these actions and to associate himself with the retained Connecticut law firm of Feingold & Fernino.

On October 25, 1968, a motion was filed by Attorney Feingold requesting that Attorney Julien be allowed to take a deposition of the defendants in one of the pending actions. Over the objec-

tions of defendants, Superior Court Judge Bodganski allowed Mr. Julien to take the deposition stating:

> "I doubt very much if he can get the right to try the case. He may get the right to sit in as associate counsel but I think the Court would prefer to have Connecticut counsel actually try it . . . . You want him to take (the deposition) because of his expertise knowledge in this particular type of case . . . . What's wrong with that? Objection overruled to deposition being taken by this particular person alleged in the motion."

On May 6, 1969, Judge William Tierney entered an order permanently enjoin-

ing Attorney Julien from "taking, participating in, assisting in or aiding and assisting other counsel at the taking of the depositions" and enjoining plaintiff Silverman "from making use of the legal services of . . . Alfred S. Julien, for the purposes of taking, participating in, assisting in or aiding and assisting other counsel at the taking of the depositions . . . ."

While the Judge did say that New York attorneys a number of years ago abused the pro hac vice privilege and that control of out-of-state counsel proves difficult, he rested his decision upon the fact that opposing counsel objected to Mr. Julien's appearance in the case.

> "The Court: Hasn't it been cus-

tomary in certain specialized cases of this sort to permit outside counsel to appear and try the case?

Mr. Lyons: Without opposition. Over objection of opposing counsel I have never, and the plaintiffs (seeking injunction) in this case will testify that they have never known of any instances where it has been done over the objection of members of the Bar of the State of Connecticut.

. . . .

The Court: On this matter of a deposition I have never heard of it. The fact that these gentlemen,

some of them who have had as much or more experience than I have, say it is not the practice here and many judges have refused to permit it and you have nothing to offer in the alternative . . . ."

On November 3, 1970, Mr. Feingold moved that Mr. Julien be granted permission to try these actions, and this motion was denied by Judge Otto LaMacchia without a hearing. The Judge's decision was based upon his long-held view that the parties must act only through Connecticut counsel who are subject to the control of the court.

Upon this denial of Attorney Julien's request to try their case, the

plaintiffs seek relief in this Court, alleging that their constitutional rights have been violated, due to the exclusion of their selected trial attorney, who admittedly is not licensed to practice law under the rules prescribed in the Connecticut Practice Book.

JURISDICTION

This action alleging the denial of rights guaranteed by the first, sixth, and fourteenth amendments to the Constitution is brought under the Civil Rights statute, 28 U.S.C. § 1983. Jurisdiction is grounded upon the parallel jurisdictional section of the United States Code, 28 U.S.C. § 1343(3). The State contends that what is at issue is merely

a property right not cognizable under § 1343(3), citing Tinchon v. Harder, Dkt. No. 35151 (2d Cir. Feb. 18, 1971), where a probational welfare worker who claimed a denial of due process in her firing was non-suited for lack of jurisdiction. But the plaintiffs' case, which alleges several constitutional deprivations, has much more substance to it than Tinchon; it does not merely rest upon "a claimed denial of procedural due process standing alone . . . ."

It is further urged by the defendants that the plaintiffs have ignored their state remedies and therefore have no standing to apply to the federal court for relief. However, exhaustion of state remedies does not control the right to assert a claim under the Federal Civil

Rights Act in a federal court. Lane v. Wilson, 307 U.S. 268 (1939). See also, Matzner v. Brown, 288 F. Supp. 608 (D.N.J. 1968).

Further serious question may be raised as to the certainty of an appellate procedure in such a case as this involving a pro hac vice court appearance. Neither party has cited any controlling Connecticut case to substantiate that such a right to appeal exists. Until O'Brien's Petition, 79 Conn. 46 (1906) "(i)t (was) questioned by high authority whether an appeal or writ of error would lie from disbarment orders . . . . In two cases the (Connecticut Supreme) Court . . . suggested a doubt upon this point and left the doubt unresolved." (In re Durant,

80 Conn. 140, 149 (1907)).

After O'Brien's Petition, supra, the Connecticut courts deemed disbarment orders to be appealable. Similar holdings have been rendered regarding admission proceedings. See In re Application of Dodd, 131 Conn. 702, 707, (1945) and Heiberger v. Clark, 148 Conn. 177, 183 (1961). However the basis of the appealability found in O'Brien's Petition was that the matter was an "action" or a "proceeding in the courts named for the purpose of obtaining such redress as the law provides." (O'Brien's Petition at 59). Similarly although Ricci v. Naples, 108 Conn. 21 (1928) indicates that certain judgments granting injunctive relief may be appealed, which are not completely determinative

of all the issues, that authority still requires that the essential elements of a case must exist to warrant appellate action.

Cases from other jurisdictions that have considered the point have held the right to appeal to be doubtful or nonexistent. In FitzGerald v. Cassidy, 249 F.2d 91 (4th Cir. 1957) an attorney sought to appear pro hac vice, but was denied by the trial judge on the ground of unlawyer like conduct in a case in which he sought to appear. On appeal the court noted:

> "It is well settled that permission to a nonresident attorney who has not been admitted to practice in a court, to appear pro hac vice in a case

> there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. . . There is grave doubt whether the denial of such permission is appealable, since what is denied is not a right but a mere privilege . . . ."(at 92).

Directly in point is Atchison, Topeka and Santa Fe Ry v. Jackson, 235 F.2d 390 (10th Cir. 1956). This case arose under the Federal Employers Liability Act, and at the pre-trial stages the district court permitted an out-of-district law firm to appear for the plaintiff. After a verdict for the plaintiff, the defendant appealed partially

on the ground that it was error for the trial court to permit pro hac vice counsel. The appeals court stated:

> "(T)he action of the court in permitting the Minneapolis firm to appear as counsel and participate in the trial of the case constituted judicial action in the nature of an interlocutory order in this particular case . . . . By 28 U.S.C.A. § 1292, courts of appeal are expressly vested with jurisdiction to entertain direct appeals from certain kinds of interlocutory orders. The order permitting the Minneapolis firm to participate in the trial of the case does not fall within the purview

> of that statute. And such order could not have been brought to this court for review by direct appeal." (at 392).

The appeals court did find that the interlocutory action permitting the firm to appear was appealable after the final judgment in the FELA action, subject to the rule that "the question whether the privilege under the rule of comity to appear as counsel and participate in the trial of the case should be extended to or withheld from the Minneapolis firm was addressed to the sound judicial discretion of the trial court." (at 393). There is thus strong authority for the proposition that plaintiffs do not have an avenue of appeal at the present time and must await

the outcome of their wrongful death suits, before contesting the rulings made at the trial stage.

The defendants next advance the argument that since the state wrongful death proceedings are already in progress, the federal "anti-injunction" act applies:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

Other that in a situation involving harassment or bad faith (see

e.g. Taylor v. Kentucky State Bar, 424 F. 2d 478 (6th Cir. 1970)), the anti-injunction act's express exceptions must be met or the federal court is without jurisdiction to grant relief.

> "On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. Atlantic Coast Line RR. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, (1970).

It is contended by the Plaintiffs that the Civil Rights Statute as an Act of Congress provides the specific exception needed to give jurisdiction to the Court.

The Supreme Court has never resolved the issue of whether the Civil Rights Statute provides an exception to the anti-injunction act. See Dombrowski v. Pfister, 380 U.S. 479 (1965), note 2. The circuit courts have divided on this issue. Compare Lenska v. Sercombe, 401 F.2d 520 (9th Cir. 1968) and Baines v. City of Danville, 337 F.2d 579 (wih Cir. 1964) with Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir. 1950). In a recent Second Circuit case (brought under §1983) involving a first amendment challenge to New York's bar admission rules, the court stated:

> "Defendants also argue that the plaintiffs who have passed the examination have, by presenting their certificates to the appel-

late division and obtaining questionnaires from the character committee, commenced 'proceedings in a State court' within the anti-injunction statute, 28 U.S.C. § 2283, and that the grant of an injuction would violate that statute. Even if this were true, it would not prevent us from granting an injunction in favor of the law students. Further, we see no merit in the argument, quite apart from any question whether the Civil Rights Act creates an exception to § 2283. The purpose of the anti-injunction statute is to prevent a state court defendant from invoking the aid of a federal

court to block an action instituted against him - not to prevent a state court applicant from seeking federal aid to eliminate what he considers an unconstitutional roadblock created by the state. Law Students Civil Rights Research Coun., Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) note 4, (Three-Judge Court Consisting of Friendly, Bonsal, Motley), affirmed 39 U.S. L.W. 4177 (U.S. Feb.23, 1971).

While the aforesaid decision is not completely determinative of whether the Civil Rights Act creates an exception to the anti-injunction act, it does afford sufficient authority for the conclusion of this Court that § 2283 does not bar

the plaintiffs' suit on this ground.

The final jurisdictional argument advanced by the defendants is based upon the "Theard Doctrine", taken from Theard v. United States, 354 U.S. 278 (1957), which stands for the doctrine that federal courts do not, except in extremely limited circumstances, review state bar proceedings. See also Martin v. Walton, 368 U.S. 25 (1961). There are exceptions to this "Theard Doctrine" arising from constitutional claims involving the Due Process and Equal Protection clauses. Konigsberg v. State Bar of California, 353 U.S. 252 (1957) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). See also Keenan v. Board of Law Examiners of the State of North Carolina, 317 F.Supp.

1350 (E.D.N.C. 1970) (three-judge court) allowing a first amendment challenge to a bar examination rule.

It has been suggested that these exceptions to Theard may not be raised in the lower federal courts, but rather "a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which such review may be had." Mackay v. Nesbitt, 285 F. Supp. 498, 503 (D. Alaska 1968) aff'd. 412 F. 2d 846 (9th Cir. 1969), cert. denied 396 U.S. 960, reh. denied 397 U.S. 1004 (1970). In reply, the Keenan court has stated:

> "Because the cases reaching the Supreme Court in recent years involving admission to a state bar, e.g. Schware, Supra, have

come up via the state courts, the Supreme Court has had no occasion to decide the scope of inferior federal court jurisdiction in such cases. Thus the application of the Theard doctrine to bar inferior federal court subject matter jurisdiction of claims of constitutional invalidity of bar admission requirements is not settled. It is, however, the clear implication of (cited cases) that the'hands off' no subject matter jurisdiction rule is inapplicable to Fourteenth Amendment claims with respect to admission to practice, and that state court preemption is probably limited to disciplinary

proceedings not involving constitutional questions." (at1354)

This conclusion is borne out by Jones v. Hulse, 391 F. 2d 198 (8th Cir. 1968) where a disbarred lawyer who had appealed through the state system and had been denied certiorari to the Supreme Court brought an action in the federal district court alleging errors in the disciplinary proceeding. The court noted that there may be times when a disbarred lawyer could under appropriate circumstances gain relief in the federal courts; however, the court denied relief upon this record, which showed a lack of constitutional issues and full appellate review in the state courts.

The plaintiffs allege injury to

rights arising under the first and fourteenth amendments and there is sufficient justification for rejecting the general rule drawn from the Theard case. This is the exceptional case relating to state bar proceedings, which has a jurisdictional basis in the federal court.

MERITS

The plaintiffs' first claim is that their first amendment rights have been violated and that the constitutional guarantee of these rights is applicable to the states under the privileges and immunities clause of the fourteenth amendment. The plaintiffs rely for these assertions upon three historic

cases of the Supreme Court. NAACP v. Button, 371 U.S. 415 (1963), Brotherhood of RR. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964), and United Mine Workers v. Illinois State Bar Ass'n., 389 U.S. 217 (1967). The foregoing cases protected the rights of public associations to employ legal counsel through means that the states would ordinarily be permitted to prohibit as unethical legal conduct.

The plaintiffs contend that these cases establish the right of an individual to bring suit as a privilege of citizenship through whatever counsel he chooses; however, they have never in fact gone that far. There is no indication in any of these cases, that the "privileges and immunities" clause of

the fourteenth amendment is being relied upon by the Court for its conclusions. The cases stress the associational nature of the right being protected. The Supreme Court, in both the Trainmen decision and UMW, traces the development of legislation to insure safety for workmen passed by Congress and the state legislature. It concludes that this workingman's safety legislation must be implemented by the unions through successful court action with competent counsel.

A recent application of this line of cases taken from the Supreme Court's present term confirms this analysis. In United Transportation Union v. State Bar of Michigan, 39 U.S.L.W. 4428 (U.S. April 5, 1971) the Court, again speaking

through Mr. Justice Black, declared:

> "At issue is the basic right to group legal action, a right first asserted in this court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." (at 4431).

The plaintiffs also rely upon Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) and Sanders v.

Russell, 401 F.2d 241 (5th Cir. 1968), which secured for civil rights lawyers the right to practice pro hac vice in the federal district courts of the South. But as the Sanders case points out these decisions were narrow in scope and limited only to federal civil rights cases.

> "The petitioners' position is simply that they have a federal right to retain counsel of their choice who are attorneys in good standing at their respective bars and are associated with locally-admitted counsel in non-fee generating school desegregation and civil rights cases in federal court." (at 244).

The Spanos v. Skouras Theatres Corp.

case (364 F. 2d 161 (2d Cir.), cert. denied, 385 U.S. 987 (1966), which is relied upon by the plaintiffs, is similar in approach to Lefton and Sanders. The Spanos litigation arose over whether an out-of-district lawyer was entitled to his fee in an anti-trust matter he had handled. In its in banc decision the court held in part that:

> "(U)nder the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." (at 170).

The court then proceeds to emphasize

that no "mischievous extension" of this doctrine should be made to cases not involving federal law. Only "where a right has been conferred on citizens by federal law" does the guarantee of this right also include the right to choose qualified counsel best suited for the task from any jurisdiction.

By no stretch of the imagination can the wrongful death actions being pursued here be considered federal in character as contended by the plaintiffs. An action for wrongful death was unknown at common law and is solely a creation of state statute. See Connecticut Mutual Life Insurance Co. v. New York and New Haven RR., 25 Conn.265 (1856). Therefore, it must follow that that portion of the plaintiffs' brief

based upon the first amendment and the privileges and immunities clause is lacking in merit.

Plaintiffs alternatively contend that their right to out-of-state counsel arises from the due process clause. They urge that the holding in United States v. Bergamo, 154 F.2d 431 (3rd Cir. 1946) is applicable here. Although a pro hac vice rule did exist in the district where the Bergamo case arose, the presiding judge did not allow out-of-district counsel to appear at the trial. The partial holding of that case is that in the federal court a defendant has the sixth amendment right to have out-of-district counsel of his choosing who qualify under the pro hac vice rules of the district. It has never been specifically decided in the Third

Circuit, whether Bergamo applies through the due process clause to the state courts. See Cooper v. Hutchinson, supra, and Matzner v. Brown, 288 F. Supp. 608 (D.N.J. 1968). See also State v. Kavanaugh, 52 N.J. 7,243 A.2d 225 (1968).

In any event there is no basis for plaintiffs' assertion that civil litigation need conform to the same standards as criminal cases under the due process clause; and Goldberg v. Kelly, 397 U.S. 254 (1970) does not hold otherwise. In granting welfare recipients the right to an evidentiary hearing prior to the termination of their benefits, the Court clearly indicates that this strict standard of due process extends to these recipients, because they are being deprived of life's necessities. And even in this

dire situation, the Court refused to hold that counsel must be provided at all hearings and limited its holding to permission for the recipient to retain an attorney. The Court recently stated:

> "What the Constitution does require (in civil cases) is 'an opportunity. . . granted at a meaningful time and in a meaningful manner, 'Armstrong v. Manzo, 330 U.S. 545, 552 (1965) (emphasis added), 'for (a) hearing appropriate to the nature of the case, ' Mullane v. Central Hanover Tr. Co., supra, at p.313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 39 U.S.L.W. 4294 (U.S. Mar. 2, 1971).

Turning to plaintiffs' equal protection claim, it is contended that the privilege to appear pro hac vice in Connecticut's courts is administered arbitrarily and unsystematically. According to the Connecticut Practice Book to become an attorney of this state, an attorney of another state has two options. He may meet the educational and moral standards set forth in the Practice Book and have passed an examination on his legal skill, §§ 8; or he may seek to be admitted upon motion, §§ 12-15.

According to § 13 among other requirements, the out-of-state attorney must be an actual resident of the State for at least six months immediate-preceding the application and must intend "Upon a continuing basis, to actively practice law in this state and to devote the major portion of his working time to the practice of law in this state." Plaintiffs in this case cannot claim that Attorney Julien, meets the requirements of the Practice Book, so that he might be admitted on motion.

Strict application of the rules for admission on motion have been affirmed in numerous cases. In Blaney v. Standing Committee, 129 Conn. 51 (1942) a New York lawyer sought upon motion, to practice generally in connecticut, intend-

ing primarily to become trial counsel in a pending action. The Superior Court's denial of the lawyer's petition was affirmed in the Connecticut Supreme Court because he could not clearly demonstrate his intent to practice law in the state on a permanent basis. In In re Application of Dodd, 132 Conn. 237 (1945) the Supreme Court of Connecticut stated:

> "An applicant for admission to the bar, however well fitted, may not be admitted solely on the approval of the committee. He may be admitted by the Superior Court only when qualified in accordance with rules established by the Judges of that court." (at 246).

See also, Taft v. Amsel, 23 Conn. Supp. 225 (Super. Ct. 1962) holding that an out-of-state lawyer who had performed legal services in this State for a client could not recover his fee, because he was not authorized to practice in Connecticut. The Court noted:

> "(The unauthorized practice statutes) forbid the performance of any acts, by persons not admitted as attorneys, in or out of court, commonly understood to be the practice of law." (at 227).

However, this blanket prohibition against out-of-state attorneys is not uniformly observed. Cases show that the admission of attorneys pro hac vice is at the whim and caprice of the individual judges of the courts of

the state. In this case as the pre-trial proceedings indicate, Judge Bogdanski takes the view that pro hac vice representation is allowed to the extent that an out-of-state lawyer may associate himself with Connecticut counsel, who will try the case. Judge Tierney, however, relies basically upon the rule that once opposing counsel objects, no out-of-state attorney may enter the case in any manner. Judge LaMacchia follows the Practice Book to the letter holding that no out-of-state lawyer may practice before him.

This Court takes judicial notice of the fact that there are other cases where out-of-state counsel have appeared, although the record is unclear as to the grounds upon which the appearances

have been allowed. In a criminal prosecution, State v. Seale, Dkt. No. 15844 (New Haven Super. Ct.) the defendant was permitted to engage his own California attorney as sole counsel for his defense. In State v. Costa, 154 Conn. 746 (1967) the Connecticut Supreme Court granted Attorney F. Lee Bailey permission to participate with local counsel in the argument and brief in a criminal appeal, but denied the attorney full rights of admission to argue the case before the appellate court. In a recent matter before the Supreme Court of Connecticut arising out of the 1960 strike by the International Association against United Aircraft Corporation, the Union was given permission to have its Washington counsel, Mozart

G. Ratner, orally argue and present the case on appeal. United Aircraft Corporation v. International Association of Machinists, Conn. L.J. No. 43, April 27, 1971.

This inconsistent "non-system"of admitting attorneys to practice pro hac vice in the courts of Connecticut violates the plaintiffs' rights under the equal protection clause of the fourteenth amendment to the federal constitution. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957):

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment." (at 238).

In NAACP v. Button, supra, while Justice Harlan could not agree with the majority in striking down the state's application of an unauthorized practice statute to the plaintiff organization, he still maintained:

> "It would, of course, be open to the petitioner, if the facts should warrant, to claim that chapter 33 was being enforced discriminatorily as to it and not against others similarly circumstanced." (at 470).

As the court in Cooper v. Hutchinson, supra, observed, however, a federal remedy at this juncture in the case may well be inappropriate. This appears to be a classic case for the application of the doctrine of abstention:

> "It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law . . . . Abstention certainly involves duplication of effort and expense and an attendant delay . . . . That is why we have said that this judicially created rule which stems from Railroad Comm'n. v. Pullman Co., 312 U.S. 496, should be applied only where 'the issue of state law is uncertain' . . . . A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-

state relationship." Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970).

Both justice and comity for the state court system require that the state be afforded the opportunity to consider and establish an objective rule or bench mark in the Practice Act which would clearly set forth the rights of attorneys from other jurisdictions to practice pro hac vice in Connecticut's courts. It is not required that such a rule establish a carte blanche permission for out-of-state counsel to appear in any case, where the parties so desire. Nor should the permission or denial of the privilege depend solely upon the opposition or consent of opposing counsel. Such a rule as presently ad-

ministered allows opposing counsel to determine when non-Connecticut attorneys are to practice in the state courts and takes the evaluative task away from the trial judge, reducing the judicial function to a matter of trial tactics. It also encourages arbitrary objection to counsel, because of his superior ability in a specialized field of law.

Relevant also is the Ethical Consideration 3-9 of the Code of Professional Responsibility, which reads in part:

> "(T)he demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profes-

sion should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

The Court concludes that it will retain jurisdiction in this suit, pending an appeal by the plaintiffs to the Connecticut Supreme Court for a determination as to the proper procedure to be followed in the admission of attorneys

pro hac vice. This appeal may be accomplished under § 762 of the Connecticut Practice Book, which provides in part:

> "In the interest of expediting decision, or for other good cause shown, the supreme court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

The stay agreed upon between the parties, which will temporarily delay the trial of the wrongful death actions in the state court, will remain in effect; and the defendants' motions to dismiss are denied. The parties shall file a

progress report with the Clerk of this Court on or before June 30, 1971.

SO ORDERED.

Dated at Hartford, Connecticut, this 29th day of April, 1971.

T. Emmet Clarie
United States District Judge

Entered April 29, 1971.